

1953

Work of the Supreme Court for the Year 1952 - Statistical Survey, The

Donald G. Stubbs

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THE WORK OF THE SUPREME COURT FOR THE YEAR 1952

STATISTICAL SURVEY

DONALD G. STUBBS*

The statistical survey for 1952 is derived from 291 majority opinions written by the judges and commissioners of the Supreme Court of Missouri during that year.¹ This sum represents an increase of 32 opinions from the preceding year. There were 9 opinions concurring in result, and 11 such concurrences without opinion. There were 11 dissenting opinions, and 11 dissents without opinion. During the year, Court of Appeal Judges Walter E. Bennick, James W. Broadus, and William L. Vandevanter served as Special Judges for brief periods.

TABLE I

NUMBER OF OPINIONS WRITTEN BY EACH DIVISION

<i>En Banc</i>	41
Division Number One	137
Division Number Two	113
Total	291

Table II represents a classification of the opinions according to their dominant issue. The selection of the most important issue was somewhat arbitrary, since nearly every case contained several issues.

TABLE II

TOPICAL ANALYSIS OF DECISIONS

Administrative Law	1
Adoption of Children	1
Adverse Possession	6
Appeal and Error	21
Attorney and Client	2

*Chairman, Board of Student Editors.

1. Total majority opinions for the preceding seven years is as follows: 1945,

1946, 181; 1947, 244; 1948, 254; 1949, 244; 1950, 265; 1951, 259.

Automobiles	23
Bastards	1
Bills and Notes	2
Cancellation of Instruments	4
Carriers	1
Charities	1
Conspiracy	1
Constitutional Law	2
Contempt	1
Contracts	1
Courts	12
Covenants	1
Criminal Law	40
Damages	6
Deeds	2
Divorce	3
Easement	2
Estoppel	1
Evidence	4
Executors and Administrators	7
Explosives	1
Fraud	4
Fraudulent Conveyances	1
Gifts	1
Guardian and Ward	3
Husband and Wife	3
Injunctions	1
Insurance	5
Judgments	1
Labor Relations	3
Landlord and Tenant	1
Limitations of Actions	2
Malicious Prosecution	2
Mandamus	1
Master and Servant	9
Mortgages	1
Municipal Corporations	7
Negligence	14
New Trial	3
Officers	1
Parent and Child	1
Partition	1
Partnerships	3
Patents	1
Principal and Agent	1

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Prohibition	4
Quo Warranto	1
Railroads	3
Receivers	1
Sales	1
Schools and School Districts	8
Specific Performance	8
States	1
Statute of Frauds	2
Statutes	2
Street Railroads	4
Taxation	10
Trial	3
Trusts	2
Vendor and Purchaser	1
Water and Water Courses	2
Weapons	1
Wills	11
Witnesses	2
Workmen's Compensation	7
Total	291

Table III indicates the disposition of the cases. Generally, the particular phrasing is that of the judges and commissioners. In addition to the following, there was one original proceeding disposed of by the Court.

TABLE III

DISPOSITION OF LITIGATION

Alternative Writ of Mandamus Made Peremptory	1
Appeal Dismissed	2
Appeal Set Aside and Cause Remanded with Directions	2
Cause Remanded with Directions	1
Cause Transferred to Court of Appeals	12
Decree Affirmed	2
Decree Modified and Affirmed as Modified	1
Judgment Affirmed	139
Judgment Affirmed on Condition of Remittitur	10
Judgment Affirmed in Part and Reversed and Remanded in Part	1
Judgment of Court of Appeals Reversed and Judgment of Circuit Court Affirmed	1
Judgment and Decree Affirmed	5
Judgment and Decree Reversed and Cause Remanded with Directions	1

Judgment Modified and Affirmed as Modified	5
Judgment Reversed	7
Judgment Reversed and Award Affirmed	1
Judgment Reversed and Cause Remanded	43
Judgment Reversed and Cause Remanded with Directions	30
Judgment and Orders Reversed and Causes Remanded	1
Judgment Reversed in Part and Affirmed in Part	1
Opinion of Court of Appeals Quashed and Judgment of Circuit Court Affirmed	1
Order of Distribution, Decree, and Judgment Modified and Affirmed	1
Order Granting New Trial Affirmed and Cause Remanded	10
Order Granting New Trial Reversed on Condition of Remittitur	1
Orders Reversed and Cause Remanded with Directions	3
Peremptory Writs Issued	1
Preliminary Rule in Prohibition Discharged	2
Provisional Rule in Prohibition Made Absolute	1
Writ Quashed	4
<hr/> Total	<hr/> 290

Table IV represents disposition of motions made subsequent to the decision, to the extent that such disposition can be determined from the reported opinions. Cases wherein rehearings were granted or which were transferred to the court *en banc* are necessarily not included. However, there were 16 cases wherein rehearings or transfers were granted.

TABLE IV

MOTIONS SUBSEQUENT TO DECISION

Motion for Rehearing Denied	34
Motion for Rehearing Denied and Opinion Modified on Court's Own Motion	1
Motion for Rehearing or to Modify Opinion Denied	1
Motion for Rehearing or to Modify or to Transfer to Court <i>en banc</i> denied	3
Motion for Rehearing or to Transfer to Court <i>en banc</i> Denied....	58
Motion for Rehearing or to Transfer to Court <i>en banc</i> Denied and Opinion Modified on Court's Own Motion	4
Motion to Transfer to Court <i>en banc</i> Denied	1
<hr/> Total	<hr/> 102

APPELLATE PRACTICE

CHARLES V. GARNETT*

THE JURISDICTION OF THE SUPREME COURT

Questions relating to the jurisdiction of the supreme court have again proved troublesome. During the year under review no less than twelve cases were transferred to the appropriate court of appeals for lack of jurisdiction, as against only two such transfers the previous year.¹

Two cases were transferred because title to real estate was not involved. In *Oehler v. Philpott*² the suit was to enjoin a threatened sale of real estate under power of sale in a deed of trust. The pleadings, however, did not join issue as to plaintiff's ownership of the fee, and the ultimate issue for trial was the mere enforceability or non-enforceability of the lien of the deed of trust. The court merely followed well established rules in holding that these facts do not present an issue involving the title to real estate in the Constitutional sense. In the second case, *Thacker v. Flotmann*,³ plaintiff claimed title to certain mineral deposits under a written instrument in the nature of a mining lease and option, the instrument giving plaintiffs the right of ingress and egress for the purpose of mining and providing that if within a given time for prospecting the lessees were of the opinion that the deposit justified the taking of the lease, it should become a binding lease for a term of three years. The relief sought was a judgment determining that the plaintiffs are the owners of the minerals with the right to remove same and that defendant has no right, title or interest in or to the minerals on the land. The court defines plaintiffs' rights, as created by this instrument, as in the nature of an incorporeal hereditament which is generally regarded as real property, but pointed to the fact that the interest of plaintiff therein was only an estate for years and that, therefore, the right contended for is a mere "chattel real" not unlike any lessee's right to use real property on which the lessee holds a lease. Under such circumstances, the case was held to be one where no question involving the title to real estate was involved in the Constitutional sense and the cause was transferred to the appropriate court of appeals.

In five cases supreme court jurisdiction was sought to be supported upon

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1. 17 Mo. L. REV. 374 (Nov. 1952).

2. 253 S.W. 2d 179 (Mo. 1952).

3. 244 S.W. 2d 1020 (Mo. 1952).

the ground that a constitutional question was presented. All five cases were transferred. In *Miltenberger v. Central West Enterprises*⁴ the appeal was taken from a default judgment. The suit was first filed against two defendants who made default. Later an amended petition was filed naming a third defendant. All defendants then defaulted and a default judgment was rendered against all three. After an unsuccessful motion to set the default judgment aside all three defendants joined in an appeal and it was contended that the amended petition constituted a statement of a new cause of action requiring the issuance of a new summons and that the default judgment resulted in a violation of the Fourteenth Amendment in that due process was not afforded. The court, however, pointed to the fact that there was no contention that any statute involved is unconstitutional and that the only issue to be determined was whether or not the trial court had correctly construed the petition and the amended petition and that such issue did not raise any Constitutional question. Accordingly the case was transferred.

In *Stribling v. Jolley*⁵ the trustees of a county hospital brought a declaratory action to determine the validity of a rule which it had passed whereby osteopaths were excluded from practicing in that hospital. The defendants named were the medical physicians of that county and the State Medical Association, and the osteopathic physicians of that county and the Missouri Osteopathic Association. The trial court found that the rule passed by the board was illegal and both the board and the defendant medical physicians appealed. Both appellants contended that the statute under which the hospital was organized constitutes an unlawful delegation of legislative power and that the trustees had the right to exclude the osteopaths. The court first determines that the medical doctors were not directly affected either by the statute claimed to be unconstitutional or by any rulings made by the hospital and are not in a position to raise the question of constitutionality of the statute. As to the appellant trustees, the court points out that the osteopathic doctors did not appeal from the ruling of the trial court and since they, and they only, would be in a position to question the constitutionality of the statute, the constitutional question raised by the osteopaths in the trial court does not vest the supreme court with jurisdiction. Consequently no constitutional question was presented and the cause was transferred.

4. 245 S.W. 2d 855 (Mo. 1952).

5. 245 S.W. 2d 885 (Mo. 1952).

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Similarly, in *Communications Workers of America v. Brown*⁶ the plaintiff was a labor union, a voluntary unincorporated association, seeking to recover a fine which it had assessed against one of its members. The lower court had held that plaintiff was not a corporation or suable entity and could not maintain the suit. The supreme court points out that while the question of the corporate character of the union might be determined by the application of the Constitution, the question presented did not involve a construction of the Constitution and that the essence of the union's claim is based upon principles of estoppel to deny corporate existence where no constitutional question could be involved at all. Accordingly, the case was transferred.

In *State v. St. Louis Union Trust Company*⁷ the suit was instituted by the Attorney General of the State of California against a Trustee and the Administratrix of an estate for the amount of California Inheritance tax left underpaid after the California probate of an estate had been exhausted. The defendant Trust Company was subjected to judgment for the amount of the unpaid tax and appealed claiming that the case involves construction of Section 1 of the Fourteenth Amendment of the Constitution of the United States. Pointing to the fact that the appellate presentation merely challenged the California judgment as not being binding upon the defendant in Missouri and as having been entered without due process of law and contending that its use as a basis for the Missouri judgment had the effect of depriving defendants of their property without due process of law was wholly insufficient to raise a constitutional question because it did not point to the sections of the Constitution relied upon and was a mere legal conclusion, the court held that the reply brief of appellants which undertook to demonstrate the constitutional question did not constitute presentation of that question at the first opportunity; and referring to the record, the court found no express reference to the Constitution and no section or article of any constitution relied upon and that the averments in the answer that the California judgment was without due process of law was a mere legal conclusion. The court held, therefore, that it did not have jurisdiction of the appeal and transferred the cause to the appropriate court of appeals.

In *Cotton v. Iowa Mutual Liability Insurance Company*,⁸ two jurisdictional questions are presented. The suit was a declaratory judgment action

6. 247 S.W. 2d 815 (Mo. 1952).

7. 248 S.W. 2d 592 (Mo. 1952).

8. 251 S.W. 2d 246 (Mo. 1952).

on an automobile liability insurance policy. Plaintiff had sustained damages as the result of an automobile collision with a defendant who was insured by the Insurance Company defendant and who was a member of the reserve military force of the Missouri National Guard. The accident occurred while he was returning to his home in an automobile, the property of the Missouri State Guard, from maneuvers. One defense to the claim was based upon a statute which exempted members of the military force from liability for civil action for death, injury, or property damage as the result of action taken by a member of the military force while engaged in and pursuant to the performance of lawfully ordered duties. It was contended that this statute, if construed to exempt the insured from liability in any event was unconstitutional and if military action made it necessary for defendant to operate his motor vehicle on the wrong side of the highway as the result of military orders the statute would be unconstitutional. The court, however, pointed to the fact that it was never contended that the statute was inherently and wholly unconstitutional and that, in order to confer appellate jurisdiction in the supreme court the attack must be that the statute under any all constructions of which it is susceptible is unconstitutional. On the second issue, the amount involved, the court points to the fact that plaintiff may never secure any judgment at all in his damage suit and that the jurisdictional amount does not conclusively and affirmatively appear from the record. The court, in the course of the opinion, states:

"We are not to indulge in speculation and conjecture as to the amount involved for the purpose of assuming appellate jurisdiction."

The case was, accordingly, transferred to the appropriate court of appeals. In a similar case, *M. F. A. Mutual Insurance Company v. Quinn*,⁹ jurisdiction was also denied on the ground that the declaratory action on such an insurance policy did not definitely and affirmatively disclose the amount actually involved because it was not disclosed by the pleadings the money amounts of the claims made under the policy. That case, too, was transferred.

In *Jenkins v. Jenkins*¹⁰ the action was one to modify a divorce decree. It was pointed out that the modification sought amounted to \$400.00 per month and that while the relief sought, if granted, might in subsequent years be of money value much in excess of \$7500.00 it is apparent that, if the wife should remarry or the husband should die before the requisite amount was

9. 251 S.W. 2d 633 (Mo. 1952).

10. 251 S.W. 2d 643 (Mo. 1952).

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reached, the jurisdictional amount would not be involved. In other words, the amount involved was contingent. Accordingly, the case was transferred. So, also, in *Gillespie v. American Bus Lines*,¹¹ a compensation case, while the compensation claim filed included a claim for total permanent disability which would be in excess of \$7500.00, the whole record disclosed that his appeal from an order denying the claim in toto was only one contending that he had a compensable claim, not that his injury was both total and permanent. Thus the requisite jurisdictional amount was not affirmatively shown and the cause was transferred. Again, in *Goodrich v. Rhodes*¹² an action to declare a vendor's lien on a stock of merchandise and foreclose it, the action was based upon a claim that defendant's had permitted the stock of merchandise to become depleted so that the value thereof was below the amount of a \$10,000.00 note, for the payment of which the vendor's lien was sought; but the record did not show the extent to which the stock had been depleted and, since there was no affirmative showing in the record that the amount in controversy was in excess of \$7500.00 the cause was transferred. In *State ex rel Kirks v. Allen*¹³ it was again held that a prosecuting attorney is not a State officer within the meaning of the constitutional provisions as to the jurisdiction of the supreme court, and that cause, also, was transferred.

THE RIGHT OF APPEAL

In *Carver v. Missouri-Kansas-Texas R. R.*,¹⁴ plaintiff had a verdict in a negligence action upon which the trial court ordered a remittitur. Although excepting to the order, plaintiff accepted the remittitur, and judgment was entered on the verdict as so reduced. Both plaintiff and defendant appealed. Plaintiff's appeal was on the ground that the remittitur was under the compulsion of a final order and was not voluntary. The court, however, points out that an order of remittitur is, in effect, an order granting defendant a new trial with privilege in plaintiff of filing a remittitur and defeating defendant's new trial and that plaintiff is given the privilege of an election to accept or refuse the remittitur. The court holds that by accepting the remittitur plaintiff obtains a judgment he would not otherwise hold, deprives the defendant of a new trial, and puts the expense of the appeal upon defendant; and that such acceptance is based upon plaintiff's voluntary consent and

11. 246 S.W. 2d 797 (Mo. 1952).

12. 251 S.W. 2d 652 (Mo. 1952).

13. 250 S.W. 2d 348 (Mo. 1952).

14. 245 S.W. 2d 96 (Mo. 1952).

he may not question the validity of the order after accepting it. Accordingly, plaintiff's appeal was dismissed.

In *Heinrich v. South Side National Bank*,¹⁵ plaintiff sued defendant bank to collect a deposit held by the bank which had originally been made in the bank in the name of plaintiff and her mother, who died before the action was brought. Defendant filed an answer and an interpleader asking that the administratrix of the mother's estate be made a party. The trial court entered an order finding that defendant's bill is a proper bill of interpleader and sustaining it, and ordering that summons issue against the adverse claimants to the fund. The order did not include any direction to pay the money into court, nor to discharge defendant. Plaintiff filed a motion for new trial, and on the overruling of that motion, appealed. Notwithstanding the provisions of the civil code with respect to interpleaders¹⁶ which have the effect of broadening the former equitable remedy of interpleader, the court holds that "there can still be no final judgment at the interpleader stage of the case unless the interpleader as a stakeholder pays the money into court and is discharged from the case leaving the interpleaders to litigate for it between themselves." Because of the fact that the trial court's order did not require defendant to pay the money into court nor discharge defendant, plaintiff's appeal was dismissed.

An interesting situation with respect to the right of appeal was considered by the court in *Stith v. St. Louis Public Service Company*.¹⁷ That was an action for damage for personal injuries. Plaintiff had a verdict and judgment for \$25,000.00. Defendant filed its alternative motion for judgment or a new trial. The trial court ordered a \$7500.00 remittitur, overruled defendant's motion for judgment, overruled defendant's motion for new trial in all respects, and, alternatively if plaintiff failed to remit, sustained defendant's motion for new trial on the ground that the verdict was excessive. On plaintiff's refusal to remit, the court ordered a new trial on the damages issue only. Both parties appealed. Pointing to the rule that for the purposes of an appeal a judgment must be a final judgment and must ordinarily dispose of all parties and all issues, and to the fact that there was no final judgment against defendant from which it could appeal, the court declares that a trial court may by an appropriate order make the judgment final as to any party as to whom, or on any issue on which, no new trial is ordered and that any

15. 250 S.W. 2d 345 (Mo. 1952).

16. Mo. REV. STAT. §§ 362.360 and 507.060 (1949).

17. 251 S.W. 2d 693 (Mo. 1952).

party aggrieved by such a final judgment is entitled to appeal; but where, as in the case being considered, the trial court does not enter such an order and grants a new trial as to less than all parties or on less than all issues, the judgment previously entered, and partially set aside, cannot become final. The order first overruled defendant's after trial motion to set aside the verdict and judgment and the court holds that the overruling of such an after trial motion is not appealable. However, in discussing the language of the trial court's order, it is pointed out that the order was the overruling of defendant's motion in its entirety and an order on the court's own motion of a new trial on a single issue. The new trial ordered was one for which defendant had not asked in its new trial motion and one which plaintiff did not seek. The court construes the language of the order and of the statute which provides for an appeal by an aggrieved party from any order granting a new trial¹⁸ as an order for a new trial as to the issue of damages only and holds that both plaintiff and defendant as aggrieved parties by such order were entitled to appeal. It must be noted that the opinion is by Judge Lozier and that in the concurring opinion of Judge Hyde, in which two other judges concurred, making the Hyde opinion the majority opinion of the court, the view is expressed that defendant's right of appeal should not be limited to the circumstances of the court ordering a new trial of its own initiative and reaches the conclusion that defendant was aggrieved by the order of the trial court granting it a new trial on damages only and would be entitled to appeal even if the order were made more than thirty days after the entry of the judgment. Judge Hyde states: "a defendant does not get what he asks for by such an order and if he is entitled to a new trial on the issue of liability because of error committed against him the order does not give him all to which he is legally entitled."

RECORDS AND BRIEFS

While the court continues to be lenient in dealing with infractions of its rules with respect to the content of briefs, the appeal in *Clark v. Empire Trust Company*¹⁹ was dismissed because the brief contained no assignments of error and the points and authorities merely stated certain abstract propositions of law without in any way showing their applicability to the case to be considered and does not specify the allegations of error as required by Rule 1.08. The court states: "We are left without sufficient information on

18. Mo. REV. STAT. § 510.330 (1949).

19. 248 S.W. 2d 603 (Mo. 1952).

which to proceed. There is no question before us for review." However, in *Wipfler v. Basler*²⁰ the court overruled respondent's motion to dismiss for failure to comply with Rule 1.08, although the statement does not cover the facts favorable to the respondent and upon which the jury returned the verdict, and many of the points and authorities were abstract in nature requiring the court to speculate as to the specific matter constituting the alleged error, and references to pages of the transcript are not found in the argument or in many of the points and authorities. The court states: "The rules involved are not only to aid the court in its work but also to guard against the disturbance of judgments except upon a full and fair presentation of the whole record necessary to a determination of properly presented errors. Our study of contestant's brief and the record indicates that some of the issues are sufficiently developed to call for a ruling." The court then reviews the case upon its merits and confirms the judgment. Also, in *Carver v. Missouri-Kansas-Texas R. R.*,²¹ appellant's statement of facts omitted essential facts and the points and authorities were subject to criticism and attack, but respondent supplied a statement giving its view of the case so that the court was not required to search out for itself to discover what was to be determined. Under such circumstances, the plaintiff's motion to dismiss was overruled.

CRIMINAL LAW

WILLIAM J. CASON*

The Supreme Court of Missouri considered forty-eight criminal appeals during the year 1952. The trial court was affirmed in thirty-six and reversed in nine. In one case the appeal was set aside and the cause remanded with directions. In one case judgment was reversed and the defendant discharged. In one case the cause was set aside and remanded with directions. One case was reversed and remanded though defendant was not represented by counsel in the appellate court and had filed no brief.¹

Most of the cases presented were disposed of upon well settled principles of law. However, there were several novel and interesting developments in this field. Those cases, along with a number of cases which present mat-

20. 250 S.W. 2d 982 (Mo. 1952).

21. 245 S.W. 2d 96 (Mo. 1952).

*Prosecuting Attorney, Clinton, Mo. B.S., University of Missouri, 1948, LL.B., 1951.

1. *State v. Kinard*, 245 S.W. 2d 890 (Mo. 1952).

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ters of special interest to those actively engaged in the trial of criminal cases, are here considered.

I. PROCEDURES BEFORE TRIAL

The greater portion of 1952 cases concerning procedure before trial were confined to the question of sufficiency of informations, but there were several other interesting points. Under the peculiar facts of one case it was held that a delay of twenty years between the time when one charged with murder was originally arrested and the beginning of his second trial for the same offense did not constitute denial of his constitutional right to a speedy trial.²

The court again indicated that an application for continuance made by a defendant under Section 545.720, *Missouri Revised Statutes* of 1949, must comply strictly with the requirements of that section. In the case of *State v. Brockman*,³ it was held that the application must not only state that diligence was used but must state "what" diligence was used and must also state the probability and time of procuring the testimony.

For the first time the supreme court ruled on the question of the liability of the putative father of a child born out of wedlock to the penal provisions of Section 559.350, *Missouri Revised Statutes* of 1949, which defines as a misdemeanor the failure of a man to support his child, "born in or out of wedlock, . . ." The court held that the correct interpretation of the statute was that the statute did not apply to the illegitimate child of a man unless he had the "care or custody" of the child. Defendant was discharged by the court.⁴ It would appear though that the new found liberty of the errant father was short lived. The court in its opinion in the *White* case suggested that the legislature might offer a remedy which would help the plight of the illegitimate child. The legislature accepted the suggestion and plugged the hole out of which *White* slipped in the above case. The clause, "and it shall be no defense to such charge that the father does not have the care and custody of the child or children . . ." was added by House Bill No. 309, effective August 29, 1953.

An information charging the defendant with contributing to the delinquency of a minor was held sufficient in one case⁵ and an information charging defendant with molestation of a minor was held sufficient.⁶

2. *State v. Hadley*, 249 S.W. 2d 857 (Mo. 1952).

3. *State v. Bockman*, 251 S.W. 2d 607 (Mo. 1952).

4. *State v. White*, 248 S.W. 2d 841 (Mo. 1952).

5. *State v. Bolte*, 247 S.W. 2d 863 (Mo. App. 1952).

6. *State v. Frazer*, 248 S.W. 2d 645 (Mo. 1952).

II. TRIAL

A. *Selection of the jury.*

Warning has been given by the supreme court in one case that a practice generally prevalent with reference to the excusing of jurors will have to be discontinued. Most attorneys in active practice will probably agree that it is not uncommon for some person other than the judge to excuse a venireman. Sometimes this is done by the sheriff and on some occasions by the circuit clerk. On other occasions it is done by one of these two or some other person at the direction and with the approval of the judge.

In the case of *State v. Thursby*,⁷ sixty-five veniremen were excused. Of this number the judge had talked with thirty-three and had listed them to be excused. The other thirty-two veniremen were excused by a deputy sheriff who was told by the judge to excuse as many as thirty-two veniremen in addition to the thirty-three the judge had talked with and to pick those who "wanted to get off." There was no evidence tending to show that the deputy sheriff did anything in connection with excusing the thirty-two veniremen which was actuated by an improper motive. On these facts the court held that the fundamental legal status of the trial jury ultimately selected had been destroyed by the action of the judge and deputy sheriff and that the trial jury was not a legally constituted instrumentality for the trial. The case was reversed and remanded on this point.

B. *Evidence*

1. Confessions and Admissions

Defendant's counsel in one case asserted that there is a distinction between the test of defendant's mental capacity to make a *confession* to a crime and his mental capacity to *commit* the crime itself. It was argued that the former is the same as in the execution of a will or contract, whereas the latter is the ability to distinguish between right and wrong. This contention was overruled by the court, and it was held that the issue on the sanity of an accused and the issue of capacity on a confession he has made must be measured by the same test.⁸

In another case, notes written by the defendant to another offering to pay money in consideration of the other's being a witness for the defendant at the trial of the case were held to have been properly admitted under the

7. *State v. Thursby*, 245 S. W. 2d 859 (Mo. 1952).

8. *State v. Rose*, 245 S. W. 2d 324 (Mo. 1952).

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rule that an attempt to fabricate evidence is admission of a defendant's guilt of the main facts charged.⁹

2. Burden of Proof—Insanity as a Defense

Under the peculiar facts of the case considered, the court held in one case that an instruction in the usual form concerning the burden of proving insanity was prejudicial error. The facts were that the probate judge of the county had issued a lunatic warrant for the defendant on the same day the defendant had shot the deputy sheriff. Defendant had shot the deputy sheriff in resisting the arrest. The court stated that the evidence in the record showed that the defendant's insanity was chronic and continuing. It was held that under these circumstances defendant's continued insanity should be presumed and the burden of establishing sanity at the time of the shooting would be upon the state.¹⁰

3. Proof of Prior Conviction Under Habitual Criminal Act

In one case prosecuted under the habitual criminal statute the defendant asserted on the appeal that he had previously been tried under that statute in this state and that the jury had found that he had not been convicted of prior felonies and so that question was now *res judicata* and could not be tried by the State again. The court did not rule on the question but avoided it on the procedural point that the record itself did not show the previous trial and acquittal under the Habitual Criminal Act.¹¹ The question is apparently an open one in this state and should be kept in mind by counsel for the defense and the State.

In *State v. Davis*,¹² the court ruled that it was not prejudicial error for the State's attorney in a case being prosecuted under the Habitual Criminal Act to refer in voir dire and opening statement to the specific felonies, naming them, of which defendant had previously been convicted. The court stated that prejudice there was, but that it is inherent when the habitual criminal issue is presented.

C. Instructions

An instruction placing the burden of proof on the defendant to "establish" the fact that he had reasonable cause of fear in a second degree murder

9. *State v. Christian*, 245 S.W. 2d 895 (Mo. 1952).

10. *State v. Elsea*, 251 S.W. 2d 650 (Mo. 1952).

11. *State v. O'Brien*, 249 S.W. 2d 433 (Mo. 1952).

12. *State v. Davis*, 251 S.W. 2d 630 (Mo. 1952).

case was held to be prejudicial error because of the use of the word "established."¹³

In a manslaughter case one of the defenses was that of "accident." The trial court gave an instruction on accident which appeared to be in the usual form and which had as the first clause the following: "The Court instructs the jury that the defense in this case is that Earnest B. Hyde came to his death by accident, . . .". The defendant on the appeal asserted that though accident was one of his defenses, under his plea of not guilty and the evidence it was remotely possible that the jury could have found that the deceased did not come to his death by accident or at the hand of defendant but by the act of some third person. It was then reasoned that the court's instruction telling the jury that "the defense" was accident eliminated one of defendant's defenses.

The supreme court accepted the defendant's reasoning and held that a defendant is entitled to have any theory of innocence submitted to a jury, however improbable that theory may seem, so long as the most favorable construction of the evidence supports it. The court further stated that an instruction which eliminates a theory of innocence or a defense is prejudicially erroneous.¹⁴

In the case of *State v. Higgins*¹⁵ an assault instruction which stated that the mere placing of hands by defendant on prosecutrix would constitute a common assault and which did not state that, to make it an unlawful assault, the act must have been against the will of the prosecutrix, intentionally done in such rude, insolent, or lustful manner as likely to cause her injury by offending against her sense of personal dignity, was reversibly erroneous.

D. Conduct of Jury

Permitting jurors during trial of a forcible rape prosecution to have contact with persons other than the sheriff and his sworn deputies by permitting some jurors to have a doctor give them hypodermic injections of vaccine while the jurors were in a residence in which the jury was quartered before termination of the trial, and to be separated by permitting some jurors to retire to a rest room in the judge's chambers while other jurors remained in the hallway, was held to be not prejudicial error.¹⁶

13. *State v. Forsythe*, 251 S.W. 2d 17 (Mo. 1952).

14. *State v. Kinard*, 245 S.W. 2d 890 (Mo. 1952).

15. *State v. Higgins*, 252 S.W. 2d 641 (Mo. App. 1952).

16. *State v. Rose*, 249 S.W. 2d 424 (Mo. 1952).

In a murder case two female jurors left the rest of the jury of men and went to the women's rest room and while there were in the presence of the sheriff's wife and another woman. The judge upon learning of the incident interrogated the women jurors and the sheriff's wife and then ordered that the trial be continued and the jury be not discharged. The supreme court held this action was a proper exercise of the trial court's discretion.¹⁷

E. *Argument of Counsel*

In a prosecution for child molestation the state's attorney argued that "there has been a wave of sex crimes." There was timely objection and the trial court sustained the objection and admonished counsel to stay within the record. The supreme court held that the argument did not constitute prejudicial error under that state of the record.¹⁸

In the case of *State v. Johnson*,¹⁹ a murder case, the prosecutor in arguing the distinction between first and second degree murder stated that the difference was in the defendant's state of mind. He then asked the jury, "What evidence do you have of the condition of his mind?" Defendant's counsel objected on the ground that this was a comment on defendant's failure to testify in violation of the statutory prohibition of such argument.²⁰ The opinion of the court written by Judge Ellison, as amplified by the excellent concurring opinion of Judge Leedy, held that the argument was not error. The appellate court interpreted the argument as being merely a permissible argument by the prosecutor that the defendant should be convicted of first degree murder and not second degree murder because there was no evidence, considering the case as a whole, that defendant did not have the specific intent to kill the deceased. There was a dissenting opinion by Judge Conkling to the effect that the argument was in clear violation of the statutory prohibition against comment on failure of the accused to testify.

Allowing the prosecutor to argue that he knew of facts indicating defendant's guilt which could not be introduced in evidence because of the hearsay rule was held to be prejudicial error in the case of *State v. Montgomery*.²¹ This case is a clear holding that an argument made by the State's attorney so as to intimate or infer to the jury that he possesses or knows of facts tending to establish the guilt of the defendant on trial, and which are not

17. *State v. Emrich*, 252 S.W. 2d 310 (Mo. 1952).

18. *State v. Randall*, 248 S.W. 2d 860 (Mo. 1952).

19. 245 S.W. 2d 43 (Mo. 1951).

20. Mo. REV. STAT. § 546.270 (1949).

21. 251 S.W. 2d 654 (Mo. 1952).

in evidence, or which for some reason could not be introduced in evidence will be prejudicial error.

III. SPECIFIC OFFENSES

A. *Burglary*

In a prosecution for burglary in the first degree an allegation and finding that the method of gaining entry was by bursting or breaking is essential.²² This is not true of the prosecution for burglary in the second degree.²³ In a burglary case distinguishing the two offenses the court held that where the evidence showed that entry was by raising a window this was sufficient breaking for the offense of second degree burglary.²⁴

An information that charged that the persons whose premises were burglarized were co-partners doing business as named motor company was held to be sufficient notwithstanding the fact that it was not charged that the motor company was or was not a corporation, partnership or individual.²⁵

B. *Rape*

The value of the use of demonstrative evidence in presenting the State's case in a rape prosecution is illustrated in one case where the State's attorney was allowed to introduce the pants worn by the prosecutrix at the time of the offense along with other evidence.²⁶

C. *Homicide*

The defendant in a prosecution for murder in the first degree testified that, "All I know, I got socked from the back of the head and from the front. And the next thing I knew I was on the floor. And the gun went off." Defendant also testified that he had no recollection of shooting anyone intentionally or unintentionally. The counsel for the defendant offered an instruction on homicide by accident at the close of the evidence, which instruction was refused by the trial court. Defendant asserted this to be error. It was pointed out that if there was any evidence upon the whole record, however improbable, in support of the theory of accidental homicide²⁷ the court must instruct on that point.²⁸ However, on these facts the court

22. MO. REV. STAT. § 560.040 (1949).

23. *Id.* § 560.070.

24. *State v. O'Brien*, 249 S.W. 2d 433 (Mo. 1952).

25. *State v. Stubblefield*, 248 S.W. 2d 665 (Mo. 1952).

26. *State v. Wilson*, 248 S.W. 2d 857 (Mo. 1952).

27. MO. REV. STAT. §559.050 (1949).

28. *State v. O'Kelley*, 213 S.W. 2d 963 (Mo. 1948).

ruled that there was no evidence from which an inference could be drawn that the death was a result of accident.

IV. APPEALS

The motion for new trial in a criminal case must set forth in detail and with particularity the error committed.²⁹ This requirement seems simple enough but a consideration of the cases decided in 1952 indicate that the failure to comply with this statute as it is interpreted by the court had a marked effect on the result reached in numerous cases. Defense counsel should consider the recent cases under this statute before attempting to prepare the motion for new trial along the customary lines. If this is not done it is quite likely that an error preserved properly by timely objection and thought to have been preserved by mention in the motion for new trial may be lost.³⁰ It appears that the motion must not only state what was done and that the particular action was error but the motion must state specifically the reason why the particular action is error.³¹

In the case of *State v. Tebbe*,³² the prosecution was for permitting gambling devices on the premises of the defendant. The defendant's motion for new trial stated as follows:

- "1. That the court erred in overruling and denying the motion to quash search warrant, sheriff's return thereon and to suppress evidence secured thereunder filed herein on May 17, 1951.
2. That the court erred in admitting evidence of state witnesses procured under the execution of the aforesaid search warrant all of which was prejudicially and erroneously admitted."

On the appeal the defendant's only point was that there was error in failing to quash the search warrant and in admitting the evidence. The court held that the above assignment of error was too general to preserve the question for review of the appellate court.

A divided court held, in the case of *State v. Charlton*,³³ that the statutory proviso,³⁴ that the "court" shall order transcript of court reporter's notes of evidence in a criminal case to be furnished at public expense to an indigent defendant taking an appeal or obtaining a writ of error, refers only to the trial court and does not authorize the supreme court to order the transcript but only gives such authority to the trial court.

29. Mo. REV. STAT. § 547.030 (1949).

30. *State v. Tebbe*, 249 S.W. 2d 172 (Mo. App. 1952).

31. *State v. Tebbe*, 249 S.W. 2d 172 (Mo. App. 1952).

32. 249 S.W. 2d 172 (Mo. App. 1952).

33. 251 S.W. 2d 82 (Mo. 1952).

34. Mo. REV. STAT. § 485.100 (1949).

EVIDENCE

JACKSON A. WRIGHT*

During the year 1952, the Supreme Court of Missouri in thirty-four cases touched upon questions of evidence which the writer deems worthy of note. All of the decisions are generally within well established rules.

JUDICIAL NOTICE

The question of judicial notice was mentioned by the court in eight different cases.

In accordance with the well established rule, the court in *Twiehaus v. Rosner*¹ took judicial notice of the Emergency Price Control Act of 1942 and the Housing and Rent Act of 1947, along with the regulations issued thereunder. Likewise, in *Burton v. Moulder*,² the court took judicial notice of the records in the supreme court regarding prior cases decided by it, and in *McGain v. Sieloff Packing Company*³ the court took judicial notice of the statutes and decisions of Illinois.

In the case of *Collector of Revenue of Jackson County v. Parcels of Land Encumbered with Delinquent Taxes*,⁴ the court took judicial notice of the assessed valuation in Jackson County, as such valuation is shown in the Journal of the State Board of Equalization.

Other instances of judicial notice include *Melton v. St. Louis Public Service Company*⁵ in which the court took judicial notice that street cars, trains, and all locomotives are wider than the tracks upon which they operate, but the court refused to take notice of the extent of such overhang. In *Carter v. Skelly Oil Company*,⁶ the court took judicial notice of the volatility and explosive qualities of gasoline and the need for careful guarding against flame or spark around such gasoline. The court also stated that it was a matter of common knowledge that an adult pedestrian will walk from 2.9 to 4.4 feet per second, and that the court would so consider it in the absence of other evidence.⁷ However, in *Winston v. Kansas City Public Service Company*,⁸ the court refused to hold that it was a matter of common

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1. 245 S.W. 2d 107 (Mo. 1952).

2. 245 S.W. 2d 844 (Mo. 1952).

3. 246 S.W. 2d 736 (Mo. 1952).

4. 247 S.W. 2d 83 (Mo. 1952).

5. 251 S.W. 2d 663 (Mo. 1952).

6. 252 S.W. 2d 306 (Mo. 1952).

7. *Wofford v. St. Louis Public Service Company*, 252 S.W. 2d 529 (Mo. 1952).

8. 249 S.W. 2d 377 (Mo. 1952).

knowledge that the exit doors of modern transit vehicles open and close automatically, when passengers step on and off the steps.

RELEVANCY, MATERIALITY AND COMPETENCY

A. Competency in General

In the case of *Carver v. Missouri-Kansas-Texas R. R.*,⁹ an action under the Federal Employer's Liability Act, the court sustained the action of a trial judge in allowing the use of a model of a portion of a railroad bridge. The court stated that, since there was testimony that the model was one-sixth of the size of the original and that it was a fair representation of the original, it would be competent evidence.

B. Cross Examination

In *Lonnecker v. Borris*,¹⁰ the court held an attempted cross examination of the plaintiff to have been properly excluded by the trial court on the ground that cross examination is not proper which is argumentative; which calls for conclusions; or which assumes facts which are not proven. The court relied upon the case of *State v. Carroll*.¹¹

In the case of *Wipfler v. Basler*,¹² Section 491.030, *Missouri Revised Statutes* (1949), relating to the cross examination of an adverse party was brought before the court. This was an action to contest a will. The widow of the testator was made a party defendant by the plaintiffs, but she was not a beneficiary under the will. The court held that the statutory right under the above section is not absolute, but rests in the sound discretion of the trial court, and that such "adverse party" must be actual and that the plaintiffs could not make the widow an adverse party merely by joining her as a party defendant.

In a criminal case, *State v. Christian*,¹³ the court held that where the defendant testified under the statute he could be cross examined as to things he testified to on direct examination, and could be impeached by prior inconsistent statements which were relative to the matters testified to in the testimony in chief and which were in writing.

9. 245 S.W. 2d 96 (Mo. 1952).

10. 245 S.W. 2d 53 (Mo. 1951).

11. 188 S.W. 2d 22, l.c. 24 (Mo. 1945).

12. 250 S.W. 2d 982 (Mo. 1952).

13. 245 S.W. 2d 895 (Mo. 1952).

C. Hypothetical Questions

The court only indirectly touched upon hypothetical questions in evidence in two cases, the first being *Pinter v. Gulf, Mobile & Ohio R. R.*,¹⁴ in which the court held it proper to allow a hypothetical question containing an assumption of fact not yet in evidence, upon a promise of the asking party to connect up by later testimony as to such fact, provided such testimony is thereafter actually produced. In *Curtis v. Fruin-Colnon Contracting Company*,¹⁵ it was held that an expert witness might base a competent opinion upon not only a hypothetical question, but upon such matters as are within his own personal knowledge or observation.

WITNESSES

Concerning the credibility of witnesses and their testimony, the court states in *Roush v. Alkire Truck Lines*¹⁶ that in an action where there is a conflict between the physical facts and a witness's testimony, such conflict can be considered by the jury in determining the weight to be given to the conflicting testimony, but that it is within the sound discretion of the trial court as to whether or not an instruction on credibility should be given. Also, the court held in *State v. Thursby*,¹⁷ that the testimony of a prostitute and her procuror was sufficient substantive evidence to justify conviction of the defendant even though the procuror had been convicted of felonies and was living in adultery, the court again stating that such testimony went to the credibility of the witnesses and not to their competency to testify.

In *Baker v. Norris*,¹⁸ an action for damages arising from the collision of an automobile and a truck, the plaintiff was the driver of the car. He testified as to certain times, speeds and distances. The defendant attempted to show by computation that the testimony of the plaintiff was contrary to known physical facts, and therefore it had no probative value. The court states that in this particular case the defendant overlooked the fact that the testimony was of speed and location of vehicles, and was only estimates of the plaintiff; that the plaintiff testified he was applying his brakes at the time and that the computations of the defendant did not consider the reduction of speed, and that also in the computations made by the plaintiff,

14. 245 S.W. 2d 88 (Mo. 1952).

15. 253 S.W. 2d 158 (Mo. 1952).

16. 245 S.W. 2d 8 (Mo. 1952).

17. 245 S.W. 2d 859 (Mo. 1952).

18. 248 S.W. 2d 870 (Mo. App. 1952).

the plaintiff had not considered reaction time. In so holding, the court held the testimony to be relevant and for consideration of the jury.

An interesting example of rehabilitation of a witness was given in *State v. Emrich*.¹⁹ Upon cross examination of one McQuinn, he admitted prior inconsistent statements. Upon re-direct, the state introduced prior consistent statements to support his testimony. These prior consistent statements would otherwise have been purely hearsay evidence, but the court held them competent for the purpose of rehabilitation.

INFERENCES

*Russell v. St. Louis Public Service Company*²⁰ was a personal injury action in which it was shown that four doctors saw and examined the plaintiff. The plaintiff called only two doctors, and the defendant's attorney in argument to the jury commented upon the failure to call the other two doctors, inferring that their testimony would be unfavorable to the plaintiff. The plaintiff's attorney replied in closing argument that the defendant could have called these doctors, to which objection was made by the defendant. The court held that no error existed, since the evidence showed that the regular doctor of the plaintiff had been called, and that he and the other doctor who did testify testified fully regarding the injuries. The court states that with regard to the rule of unfavorable inferences from failure to call witnesses, such rule is limited in situations where the testimony would only be cumulative, and where there is no showing or indication that the witness not produced had superior evidence to that which had been introduced.

ADMISSIONS AND DECLARATIONS AGAINST INTEREST

Two interesting evidence problems were presented in the case of *Osborne v. Purdome*,²¹ which was a habeas corpus case arising from a conviction of criminal contempt. Evidence had been introduced in the criminal contempt proceedings of an attempt on the part of petitioner to fabricate evidence, to procure false evidence, or to destroy evidence. The court held that such facts were in the nature of an admission of guilt, and were evidence of the main facts charged.

In the same proceedings, a transcript of the testimony of a deceased witness, which testimony had been given in a contempt prosecution of that

19. 250 S.W. 2d 718 (Mo. 1952).

20. 251 S.W. 2d 595 (Mo. 1952).

21. 250 S.W. 2d 159 (Mo. 1952).

witness, was admissible against the petitioner in a separate contempt proceeding, as being a declaration against the interest of the deceased witness. In so holding the court followed the ruling of *Sutter v. Easterly*.²² The court states that the fact that the petitioner had no opportunity to cross examine was no bar to the admissibility, since it was admitted as an exception to the hearsay rule. This is a good illustration of the difference between admissions and declarations against interest.

PRESUMPTIONS

The court in *Boyer v. Guidicy Marble, Terrazzo & Tile Company*,²³ refused to conclusively presume that a seventeen year old boy has any exact amount of knowledge, capacity or experience, or that he has reached any particular status of maturity as to any given situation or subject. The court very wisely stated that the capacity, knowledge, experience and discretion of any particular individual appears to be an evidentiary circumstance as to which the party may adduce evidence.

The status of presumptions was considered in two cases. In *Hendrix v. Metropolitan Life Insurance Company*,²⁴ the court considered the sufficiency of the evidence to submit a case of accidental death in an action on a double indemnity life insurance policy. The court points out that the presumption against suicide is so strong that unless the evidence negatives every reasonable inference of death by accident, the presumption would justify the finding of death by accident. However, upon showing of clear evidence of suicide, the presumption disappears. A like holding was made in *Michler v. Krey Packing Company*,²⁵ which was a Workmen's Compensation death case. The issue presented was whether the claimant and the employee were married. The Industrial Commission had found that the claimant failed to prove such marriage. On appeal, the claimant relied upon the presumption of valid marriage arising from cohabitation, general repute and declarations and conduct of the parties. The employer relied upon the presumption that the relationship having begun on an unmarried status, such status would continue unless otherwise proven. The court held that there was evidence contrary to both presumptions, and stated that when substantive evidence was introduced by a party against whom a presumption operates controverting the presumed fact, its existence or non-existence is to be

22. 189 S.W. 2d 284 (Mo. 1945); see Note, 162 A.L.R. 446 (1946).

23. 246 S.W. 2d 742 (Mo. 1952).

24. 250 S.W. 2d 518 (Mo. 1952).

25. 253 S.W. 2d 136 (Mo. 1952).

determined from the evidence, exactly as if no presumption had ever been operative in the case. In considering the two cases, the opinions would appear to be in conflict. However, the courts have at various times found a difference in strength of presumptions, as pointed out in the *Hendrix* case.

EXPERT AND OPINION EVIDENCE

The question of qualification of experts and the use of their opinion testimony, along with the opinion testimony of non-expert witnesses again produced a number of cases. In *Wright v. Stevens*,²⁶ a will contest case, the court considered the requirements for lay witnesses to testify as to their opinion of sanity. The court stated the well recognized rule that lay witnesses are not competent to testify as to such witness's opinion of the sanity of the testator without first relating the facts upon which such opinion is based, and, unless such facts are inconsistent with such person's sanity, the witness's opinion would not be admissible in evidence. The court goes further and defines some of such facts, stating that evidence of sickness, old age, peculiarities, eccentricities in dress or oddities of habit, forgetfulness, inability to recognize friends, feebleness resulting from illness, and other facts and circumstances not inconsistent with their ability to understand the ordinary affairs of life, or to comprehend the nature and extent of one's property and the natural objects of his bounty, and which are not inconsistent with sanity, cannot be used as a basis for opinion testimony of a lay witness that the testator was of unsound mind.

In considering expert medical evidence, on the other hand, the court in *Pinter v. Gulf, Mobile & Ohio R. R.*,²⁷ allowed a doctor to testify regarding x-rays taken about two years after the accident, even though the doctor did not know the condition of the injured party prior to the time the x-rays were taken. The court said that the time lapse was to be considered by the jury in evaluating the testimony of the doctor. The difference between opinion evidence by lay witnesses and by experts, and the qualifications of an expert were well illustrated in *State v. Rose*.²⁸ This case presented the question of the qualification of a fifty-nine year old Methodist minister, who had studied for the ministry in designated reputable universities in this country and abroad; had studied construction engineering; had taken post-graduate work in philosophy, especially psychology; had done war relief

26. 246 S.W. 2d 817 (Mo. 1952).

27. 245 S.W. 2d 88 (Mo. 1952).

28. 249 S.W. 2d 324 (Mo. 1952).

work abroad; had been psychological consultant to the judge of a criminal court in Baltimore, and also to the medical staff of Fort Henry, a government hospital for plastic surgery. In a criminal rape case, the trial court had ruled the witness to not be qualified as an expert on insanity. This ruling was upheld by the supreme court. Quoting various precedents and authors, the court states that the authorities generally agree that there is no absolute standard as to qualifications for an expert, and that it is ordinarily in the sound discretion of the trial court, whose decision would be upheld and not reviewed except in extreme cases where a serious mistake had been made. The court stated the guiding principles in the case of *Wipfler v. Basler*,²⁹ in stating that an expert, to qualify, must show that he has had, and utilized, means superior to those available to the jurors or to men in general for forming an intelligent opinion of the matters upon which he is asked to testify. The same rules were applied, in the case of *Carver v. Missouri-Kansas-Texas R. R.*,³⁰ to hold the qualifications of an expert sufficient and to admit the expert's testimony on proper methods to be used in moving a "bent" (a temporary support under a railroad bridge), stating that an expert's testimony in such matters might be an aid to a jury of laymen to help them pass upon the ultimate fact at issue, to-wit: A question of negligence in the method of moving a "bent," alleged to have caused injuries to the plaintiff.

HEARSAY

In the opinion of the writer, the most interesting evidence questions presented were those regarding the hearsay rule. In *Wilson v. St. Louis-San Francisco Ry.*,³¹ the court stated the general rule that unsworn statements, not reports or letters required to be made or kept, that were not so-called "res gestae" statements, were hearsay and not admissible. However, in the case of *Moss v. Stevens*,³² evidence which would otherwise fall clearly within the above general rule was admitted. A careful reading of the opinion indicates that the court approved the admission of such testimony by the trial court only for the purpose of reflecting upon the credibility of the witness. However, some wording of the court's opinion bears consideration. This was an action by parents for the death of their infant daughter. The infant daughter had been run over by a truck. The trial court admitted, after

29. 250 S.W. 2d 982 (Mo. 1952).

30. 245 S.W. 2d 96 (Mo. 1952).

31. 247 S.W. 2d 644 (Mo. 1952).

32. 247 S.W. 2d 782 (Mo. 1952).

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denial of statements by the grandmother, the testimony of the coroner regarding statements which the grandmother had made to him to the effect that the truck had stopped just prior to the accident to avoid hitting some dogs. The court states: "However, if defendant stopped his truck as Mr. Schafer (the coroner) testified Mrs. Mastin (the grandmother) said he had, this fact had some probative value and tended to corroborate the defendant's testimony that he was driving in third gear and at a slow rate of speed as he passed the Mastins, approximately one hundred feet north of the stop. When Mrs. Mastin denied making the statement, proof that she had made it would go to her credibility, her recollection of the facts, veracity and bias." It appears to this writer that had a request been made for an instruction limiting the use of such hearsay statements, such limitation would have been proper. However, it again points out the practical fact that once evidence is introduced, for whatever purpose it may be admissible, such evidence is treated by the ordinary jury as evidence of the truth of the facts stated.

In *Lewis v. Lowe & Campbell Athletic Goods Company*,³³ a question was presented regarding statements made by a deceased several hours prior to the time of the accident which caused his death. This was an action for such death, and the question was whether or not the deceased, at the time of the accident, was working, and therefore that the accident arose out of and in the course of his employment. The evidence showed a prior plan of the deceased to go from his home in St. Louis to Potosi. He left his home about 3:30 A. M. He was alone in his car when fatally injured in the collision in question. The appellant had objected to declarations of the deceased made to his wife on the evening before that he was going to Potosi on business; to statements made to other people that he would be in Potosi on the day the accident occurred, and to his conversation with another party regarding plans for the entertainment of some business acquaintances in Potosi. The appellant objected on the grounds that such statements were self serving declarations, and that they could not be used to prove that the deceased was in the course of his employment.

The court held such evidence admissible as a part of the *res gestae*. In so doing, the court quotes at length from Wigmore on *Evidence*,³⁴ *Corpus Juris Secundum*³⁵ and a number of Missouri cases, to the effect that such

33. 247 S.W. 2d 800 (Mo. 1952).

34. Vol. 6, 3rd Edition, Paragraph 1725, page 79.

35. Under 118, *Corpus Juris Secundum* 236, page 1009.

declarations which indicate a present intention to do a particular act in the immediate future, under circumstances indicating apparent good faith, and not for self serving purposes, are admissible to prove that the act was in fact performed. The court points out that it is necessary to show that the statements must be statements of a present existing state of mind, and that all of the circumstances would indicate that such state of mind continued. The facts in the instant case, viewed in the light of this rule, were held to be such declarations which could be introduced to be considered by the jury.

Another little used exception to the hearsay rule was relied upon by the court in *Miller v. Brunson Construction Company*.³⁶ This was an action by *A*, an employee of *B*, against *C*, a contractor doing work on *B*'s building, for injuries received by *A*. *C* offered proof by *W* that *X* made a statement to a group of *B*'s employees relative to staying out of the area in which *C*'s employees were working, and that *C*'s employees also heard such statement. There was no showing that *A* was present or heard the statement. This evidence was offered on the issue as to whether *C*'s employees had reason to expect *B*'s employees in the area. Upon objection that such testimony was hearsay, the evidence was excluded. The court did not definitely rule on the matter, stating that if it was admissible, it was not material error under the facts of this case, but indicated that it should have been admitted as an "independently relevant fact." The court said that even though it was hearsay as to *A*, the fact that such statement was made, whether true or not, would be relevant and material. The court cites text authorities and Missouri cases.³⁷

Another exception was indicated in *Melton v. St. Louis Public Service Company*,³⁸ in which a portion of the hospital records were introduced. In the admittance notes were shown purported statements of the plaintiff which the plaintiff alleged as error upon introduction. The court held that the hospital records were admissible under the Uniform Business Records as Evidence Law,³⁹ and that any portions of the hospital records which were relevant and helpful to or of aid in diagnosing and treatment of the injury were admissible under the act.

36. 250 S.W. 2d 958 (Mo. 1952).

37. *Scott v. Missouri Insurance Company*, 233 S.W. 2d 660 (Mo. 1950); *German Evangelical Bethel Church v. Reith*, 327 Mo. 1098, 39 S.W. 2d 1057 (Mo. 1931), 76 A.L.R. 604 (1932); VI WIGMORE, EVIDENCE § 1789 (1940); 31 C.J.S., EVIDENCE, § 239, page 988.

38. 251 S.W. 2d 663 (Mo. 1952).

39. Mo. Rev. Stat. § 490.660 (1949).

BEST EVIDENCE RULE

In *Schroer v. Schroer*,⁴⁰ which was an action for the dissolution of a partnership, "duplicate" deposit slips were introduced in evidence without explanation of the reason for the failure to produce the originals. The court held that such introduction was not error, that a "duplicate" in legal conception as "an original instrument repeated, a document the same as another in essential particulars, differing from a copy in being valid as an original."⁴¹

DEAD MAN'S STATUTE

The dead man's statute was considered in three cases. In *Been v. Jolley*,⁴² the statute was held to apply. This was an action by the heirs of a grantor after the grantors death to set aside the deed and bills of sale conveying real and personal property. The court held the grantees in the deed and bills of sale to be incompetent to testify under the dead man's statute.

The application of the statute, however, was limited by the court in *Lehr v. Moll*⁴³ in accordance with established rules. This was an action to set aside a trust deed and note brought by the widow on the grounds that the husband had procured the widow's signature by fraud. The husband being dead, the defendants objected to the testimony of the widow. It was shown, however, that the defendants had served interrogatories on the widow. The court held that the serving of interrogatories waived her incompetency as a witness in the same manner that the taking of her deposition would waive the incompetency, relying upon *State ex rel. Williams v. Buzard*,⁴⁴ which holds that interrogatories have the same scope as depositions.

Going one step further in the case of *Baker v. Baker*,⁴⁵ the court held that the taking of the deposition of one witness by the defendant would waive the incompetency of all of such witnesses. This was an action to determine title brought by the sons and daughter of the grantor against the widow of their brother, grantee. The defendant had taken the deposition of one of the brothers, and the court relied upon the analogy of the waiver as to all doctors of the physician-patient privilege by the testimony of one

40. 248 S.W. 2d 617 (Mo. 1952).

41. 28 C.J.S., *Duplicate*, page 590; 13 WORDS & PHRASES, *Duplicate*, pages 632-635.

42. 247 S.W. 2d 840 (Mo. 1952).

43. 247 S.W. 2d 686 (Mo. 1952).

44. 354 Mo. 719, 190 S.W. 2d 907, l.c. 910 (Mo. 1945).

45. 251 S.W. 2d 31 (Mo. 1952).

doctor, holding that the defendant's waiver of this statutory disqualification as to one witness waived it as to all witnesses.

THE HUMANITARIAN DOCTRINE

WILLIAM H. BECKER, JR.

[*Editor's Note.* Mr. Becker has already reviewed the 1952 cases in this field in the January issue of the *Review* (18 *Missouri Law Review* 20). A summary of more recent developments will appear in the January, 1954 issue.]

INSURANCE

ROBERT E. SEILER*

In 1952, the Supreme Court handed down twelve decisions dealing mainly with insurance questions, more than twice the usual number. *Grafton v. McGuire*¹ involves a coverage question on an automobile liability policy issued to a garage repair partnership. *Mickelberry's Food Products v. Haeussermann*² follows the 1951 decision of *Butterworth v. Mississippi Valley Trust Co.*,³ concerning validity of an assignment of life insurance under certain circumstances despite lack of insurable interest in the assignee. *Mutual Bank & Trust Co. v. Shaffner*⁴ upholds a group insurance plan involving bank depositors. *City of New York Ins. Co. v. Stephens*⁵ holds that despite the standard policy provisions on subrogation that the insurer, where the policy is written in the name of the trustee in a deed of trust "as his interest may appear" is not subrogated to the rights of the mortgagee against the owner to the extent of its loss. *Mercer v. Miller's Mutual Fire Insurance Assn.*⁶ turns on questions of fact resolved by the jury in favor of the insured. *Monsanto Chemical Co. v. American Bitumuls*⁷ holds that where the owner agrees to carry "adequate" insurance that there is no recovery against the bailee for negligence resulting in destruction of the goods insured. *Kansas City Stock Yards Co. v. A. Reich & Sons*⁸ is in accord, holding that where the tenant paid an increase in rent to cover insurance to be taken out by the

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1. 362 Mo. 882, 245 S.W. 2d 69 (1952).

2. 247 S.W. 2d 731 (Mo. 1952).

3. 362 Mo. 133, 240 S.W. 2d 676 (1951); 17 Mo. L. REV. 396 (1952).

4. 248 S.W. 2d 585 (Mo. 1952).

5. 248 S.W. 2d 648 (Mo. 1952).

6. 249 S.W. 2d 402 (Mo. 1952).

7. 249 S.W. 2d 428 (Mo. 1952).

8. 250 S.W. 2d 692 (Mo. 1952).

landlord with the understanding that the tenant would not be responsible for damage by fire that such agreement was a defense to an action against the tenant for damages for negligence. *Richardson v. Kuhlmyer*⁹ holds that a description of a named individual as the "husband" of the insured is merely descriptive and does not prevent recovery, even though the parties were never married. *Hendrix v. Metropolitan Life Ins. Co.*¹⁰ involves the remand of a double indemnity case where the court declares as a matter of law there was no evidence to justify submission on accidental injury, although there was evidence of suicide while insane. *Leggett v. General Indemnity Exchange*¹¹ deals mostly with the procedure of dissolution of insurance companies. *Boyle v. Crimm*¹² is a case where the court goes behind the terms of absolute assignments of life policies, holding the assignment was merely for the purpose of securing various payments made by the assignee. *Saracino v. St. Louis Union Trust Co.*¹³ holds that a widow is not entitled to one third of the insurance proceeds as well as one third of the rentals, where the insurance money was used by the testamentary trustees to restore the building to its former condition. A more detailed review of the above cases follows.

*Grafton v. McGuire*¹⁴ involved a denial of coverage by the garnishee, a liability insurance company, on the ground that since the title to the automobile involved in the accident was in the name of one of the partners individually the liability policy issued to the partnership engaged in the repair of automobiles did not cover the automobile. The automobile was being used for pleasure purposes at the time of the accident by said partner. The policy was issued in the name of the two partners and excluded "ownership, maintenance or use for pleasure purposes of any automobile not owned by or in charge of the Named Insured for use principally in such operations." However, the policy clause defining the operations covered contained the words "also for pleasure use." The court held that despite the title being in the name of one partner the automobile was in fact owned by the partnership and that the insurance agent (having the authority of a general agent) who wrote and delivered the policy knew this. Therefore, the insurance company was estopped to deny liability.

*Mickelberry's Food Products Co. v. Haeussermann*¹⁵ was a contest

9. 250 S.W. 2d 355 (Mo. 1952).

10. 250 S.W. 2d 518 (Mo. 1952).

11. 250 S.W. 2d 710 (Mo. 1952).

12. 253 S.W. 2d 149 (Mo. 1952).

13. 254 S.W. 2d 600 (Mo. 1952).

14. *Supra*, n. 1.

15. *Supra*, n. 2.

between the purchasers of the capital stock and the former stockholders over the cash surrender proceeds of certain insurance policies on the lives of two former officers of the corporation. Much of the decision is concerned with the proper meaning of the life insurance trust agreement and the contract of purchase between the respective groups of shareholders. On the subject of insurance law, the contention was advanced that the purchasers had no insurable interest in the lives of the insured. The court disposed of this contention by referring to *Butterworth v. Mississippi Valley Trust Co.*,¹⁶ where the court adopted the rule that an insurable interest in the insured by the assignee is not essential to the validity of the assignment, if the party to whom the policy was issued in good faith had an insurable interest and if the assignment was in good faith and not made to cover up a gambling transaction. The court also points out that the issue of insurable interest is not actually involved, because the real issue before the court was the right of the plaintiff to the cash surrender values.

*Mutual Bank & Trust Co. v. Shaffner*¹⁷ involved a declaratory judgment action as to the legality of a proposal whereby an insurance company would insure under a group policy the lives of the bank's depositors making deposits of a certain type. The case deals mostly with the powers of banks to enter into such arrangements. On insurance matters, the court upholds the validity of such group insurance, saying that there is privity of contract between the insurer and the depositor (although also stating that such privity is not necessary), that it is not necessary that the bank have any insurable interest, and that there is no statutory prohibition against such a group policy.

*City of New York Ins. Co. v. Stephens*¹⁸ is an interesting case. It was for a combination declaratory judgment and reformation where the insurance companies sought to have declared certain subrogation rights against the mortgagor, or else that the policies be reformed so that they covered only the interest of the mortgagee. The insurance totalled \$59,500 on a large building and was in the name of "Thomas F. Stephens, Trustee, as his interest may appear." Stephens was the trustee in a \$75,000 deed of trust. Graff was the mortgagor and paid the premiums on the insurance. Iaconetti was the owner of the notes and deed of trust. The loss, by fire, exceeded the amount of the insurance. At the time of the fire the unpaid notes exceeded

16. *Supra*, n. 3.

17. *Supra*, n. 4.

18. *Supra*, n. 5.

\$68,000. The insurance companies contended that the policies were intended to secure only the interest of Iaconetti as mortgagee, not the interest of Graff as owner and that the companies were entitled to be subrogated to the rights of the mortgagee against the owner to the extent of their losses. The policies contained the standard provisions on subrogation, as follows:

"If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing the mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage."

"Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company."

The court first holds that the insurance companies did not make out a case for reformation, as the evidence failed to show the policies did not express the mutual intention of the parties.

The court then holds that the insurance companies were not entitled to subrogation against the owner: First, the owner, Graff, had an interest in the insurance. The words "Stephens, Trustee, as his interest may appear" means that the proceeds of the insurance, the same as the property, were held by the trustee for the benefit of both parties to the deed of trust. Further, the owner, in the deed of trust, stipulated that he would keep the premises insured against fire losses, which means for his benefit as well as that of the mortgagee.

Second, the insurance companies conceded that by subrogation they could recover pro tanto against the owner subject to the mortgagee's primary full coverage under the policies. The coverage was only \$59,000, whereas the outstanding notes totalled over \$68,000, so there had been no excess or double recovery by anyone concerned; hence, no subrogation.

The court also holds that since there was evidence of vexatious delay, the defendants could counterclaim for the statutory penalties, despite the fact that the litigation was commenced by the insurance companies by declaratory judgment.

The court also discusses the contention that a certain insurance agent referred to in the evidence was the general agent of the owner. The court rejects this, saying the evidence showed this person was not an agent, but a broker, hence a middleman, owing duties both to insured and insurer, and his acts would not be binding on the owner.

*Mercer v. Millers' Mutual Fire Insurance Assn.*¹⁹ was an action to collect the fire insurance on a partial loss of a stock of merchandise. The insurer failed in the trial court in its defense of arson, and the only question before the Supreme Court was the extent of plaintiff's recovery. The jury had awarded the plaintiff less than she claimed, but more than defendant claimed the loss to be, and the court holds there was no prejudicial error in the trial in respect to proof of damages.

*Monsanto Chemical Co. v. American Bitumuls Co.*²⁰ was an action by the owner of a certain stock of chemical materials against the bailee to recover for the alleged negligence of the bailee resulting in the destruction of the chemicals. A clause in the contract between the two stated that the owner agreed to carry adequate insurance to cover all stocks of materials so held. The owner collected approximately \$18,000 in insurance prior to bringing suit against the bailee. The court holds that to the extent of the owner's stipulation to insure against loss by fire, the insurance stipulated had the effect of satisfying the owner's claim against the bailee for negligence. Since the owner was obligated to carry "adequate" insurance, the claim for negligence was fully satisfied.

*Kansas City Stock Yards Co. v. A. Reich & Sons*²¹ is in accord with the general theory of the above *Monsanto Chemical* case. The *Kansas City Stock Yards* case was an action by the landlord against the tenant for damages to rented premises by fire allegedly caused by the tenant's negligence. One defense was that the rent had been raised to cover the cost of insurance, which was to be taken out by the landlord with the understanding the defendant would not be responsible for any damage by fire. The court held that such an agreement is not contrary to public policy and that the defense was supported by the evidence.

*Richardson v. Kuhlmyer*²² was a partition action, where defendants counterclaimed for proceeds of a certain insurance policy taken out by the deceased in which she named Richardson as beneficiary, describing him as her husband. They were not married at the time, nor later. The court holds that Richardson was nevertheless entitled to the proceeds, the characterization as husband being only descriptive and not controlling over the specific designation of him as beneficiary.

19. *Supra*, n. 6.

20. *Supra*, n. 7.

21. *Supra*, n. 8.

22. *Supra*, n. 9.

*Hendrix v. Metropolitan Life Ins. Co.*²³ was an action to collect double indemnity under a life policy. The case was submitted to the jury under two theories: That the gunshot wound was self-inflicted while insane, and, second, that the wound was accidental. The court analyzes the evidence and concludes there was no evidence to warrant submission of accidental injury, and hence the case must be remanded, even though there was evidence justifying submission on the first theory.

In *Leggett v. General Indemnity Exchange*²⁴ the superintendent of insurance brought suit to dissolve certain insurance entities by reason of cessation of business for a period of one year. The pleadings filed by the various defendants admitted the allegations of the petition, but sought to set up new matter as to the ownership of the stock of one of the companies involved, a certain proposed method of dissolution, ownership of various assets and for delay in dissolution. The trial court refused to hear evidence, sustained plaintiff's motion for judgment on the pleadings and ordered dissolution. On appeal the court held that since it was conceded that the companies did not intend to resume business, the trial court could not properly have refused to dissolve the corporations and properly refused to determine matters of claims and ownership before ordering dissolution.

*Boyle v. Crimm*²⁵ was a declaratory judgment action over the proceeds of six life policies on which absolute assignments had been made by the insured and beneficiary. The assignee was the brother of the insured. Prior to the assignments, the insured's brother had paid the annual premiums on two occasions and also had paid interest on the insured's policy loan. After the assignment, the assignee paid all the premiums. After the death of the insured and assignee, the present action was commenced by the beneficiaries under the policies against the executor of the assignee, each side claiming the entire proceeds. Despite the absolute assignments, the court considered parol evidence as to the purpose of the assignments and concluded that same were for the purpose of securing the assignee's subsequent payments and that the executor must account to the plaintiffs for the proceeds in excess of the debt secured.

In *Saracino v. St. Louis Union Trust Co.*²⁶ plaintiff, the widow, brought suit against the testamentary trustees for one third of a fire loss paid by the

23. *Supra*, n. 10.

24. *Supra*, n. 11.

25. *Supra*, n. 12.

26. *Supra*, n. 13.

insurer to the trustees. Deceased died intestate as to his wife. The trustees used the insurance proceeds, plus rental income from the property, to restore the premises to tenable condition. The trustees made regular payments to the widow of her third of the rent. Plaintiff claimed that the repairs were permanent improvements, and since dower had not been assigned, that she was entitled to one third of the insurance money as well as one third of the rentals. The court approved the conclusion of the trial court that the work done after the fire was not a permanent improvement, but merely constituted a restoration of the building by repairs to its former condition and that plaintiff could not claim both dower rights in the insurance money and also one third of the rent.

PROPERTY

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EFFECTIVE DATE OF LAWS

The writer has in preparation a comprehensive study of the effective date of laws in Missouri, but one phase of the problem will be noticed briefly here in connection with a very important 1952 case. The problem of the effective date of a law may be a matter of concern to a title lawyer many years after the particular law has become effective, because the effectiveness of a title transaction may depend on whether the transaction occurred before or after the effective date of a particular law, and the issue may be raised many years later in the course of a title examination. Whether an official is entitled to salary from and after a certain date, whether a defendant's conduct on a certain date was a crime, and similar problems the solution of which depends on the effective date of a law, may come in issue for a few years but within a reasonable period of time such issues become moot.

*State ex. rel. Moore v. Toberman*¹ decided several important issues as to the effective date of laws under Article 3, §§ 29, 52, Missouri Constitution of 1945. The first issue was as to the effective date of Senate Bill No. 267, Sixty-Sixth General Assembly (the bill dividing the state into eleven new congressional districts), the chronology of which was as follows: final passage, January 21, 1952;

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recess, January 22, 1952;
 approval by Governor, March 5, 1952;
 ninety days after recess, April 22 [21²], 1952;
 final adjournment, April 30, 1952; and
 ninety days after adjournment, July 29, 1952.

The majority of the court (opinion by Hollingsworth, J.; Conkling, Tipton, and Dalton, JJ., concurring) took the view that the bill became effective ninety days after recess, April 22, 1952, rather than ninety days after final adjournment, July 29, 1952. The second issue was whether the bill, having become effective April 22, 1952, was subject to referendum until July 29, 1952, ninety days after final adjournment. The majority held it was not. Ellison, C.J., and Hyde and Leedy, JJ., dissented in opinions written by Ellison, C.J., and Hyde, J.

The three opinions so ably and completely analyze the issues that further analysis would be useless. The majority arrived at a workable solution of the impossible situation created by a plain reading of the Missouri Constitution (1945), Art. 3, § 29, on the effective date of laws, and Art. 3, § 52, on the referendum.

The problem thus finally presented to the court in 1952 had been apparent since 1943 upon the adoption of an amendment to the Constitution of 1875, Art. 4, § 36, purporting to make laws effective ninety days after passage and *approval*, which was in patent conflict with the Constitution of 1875, Art. 4, § 57, on the referendum, which had been adopted in 1908. This amendment had the worthy objective of making it possible to get laws into effect within a reasonable period of time in spite of the very long sessions of the General Assembly.

A different technique designed to reach the same result was submitted by the Constitutional Convention of Missouri, 1943-1944, *viz.*, that laws could be made effective ninety days after a recess for thirty days or more: Mo. Const. 1945, Art. 3, § 29. But this was in obvious conflict with the Constitution of 1945, Art. 3, § 52, on the referendum.

2. The date should have been April 21, 1952, not April 22, 1952. By applying the usual rule of excluding the first day (day of recess) and including the last, April 22 is the ninety-first day. It is apparent that someone overlooked the fact that in 1952, February had an extra day, it being leap year.

The writer would not hazard an opinion as to which is the effective date. Senate Concurrent Resolution No. 13, Mo. Laws 1951, p. 892, provided for recess beginning January 22, 1952, and expressly mentioned April 22, 1952, as the date on which laws previously passed should take effect.

In March, 1951, I did limited research to try to discover why the Constitutional Convention of Missouri, 1943-1944, submitted an instrument with such a patent conflict between Art. 3, § 29, and Art. 3, § 52. I made a fairly comprehensive, though not exhaustive, study of the Convention's Journals, its Files No. 1-21, and its Proposals No. 1-377. It nowhere appeared that any consideration was given to the relationship between the two sections. Section 29 on the effective date of laws was handled by Committee No. 3, Committee on the Legislative Department, File No. 17. Section 52 on the referendum was handled by Committee No. 21, Committee on Initiative and Referendum, Revisions and Amendments, File No. 4. Only one man served on both committees. It is small wonder that two sections, drafted independently without any view of the other, and continuing the same basic error that existed in the Constitution of 1875 as amended in 1943, did not fit when brought together in one complete instrument.

UNLAWFUL PRACTICE OF LAW IN REAL ESTATE TRANSACTIONS

*Hulse v. Criger*³ settles to a considerable extent a problem as to which lawyers were not in complete accord, *viz.*, how far a real estate broker can go in preparing contracts for the sale of real estate, warranty deeds, quitclaim deeds, deeds of trust, notes, chattel mortgages and short term leases, without being guilty of unlawful practice of law. Many lawyers had been of the opinion that the preparation by a real estate broker of deeds, notes and deeds of trust was unlawful practice of law and that effective action could and should be taken to stop such practice; many lawyers also had been of the opinion that the preparation by a real estate broker of contracts for the sale of real estate was unlawful practice of law, but were not in complete accord as to whether effective action could and should be taken to stop such practice.

The court in *Hulse v. Criger* announced six conclusions as to the permissible sphere of action in this field by a real estate broker. The case has been so little noticed by lawyers and real estate brokers that it seems worth while to reprint these conclusions, as follows:

"First: A real estate broker, in transactions in which he is acting as a broker, may use a standardized contract in a form prepared or approved by counsel and may complete it by filling in the blank spaces to show the parties and the transaction which he has procured.

3. 247 S.W. 2d 855, 861, 862 (Mo. 1952).

"Second: A real estate broker, in transactions in which he is acting as a broker, may use standardized forms of warranty deeds, quit claim deeds, trust deeds, notes, chattel mortgages and short term leases, prepared or approved by counsel and may complete them by filling in the blank spaces to show the parties, descriptions and terms necessary to close the transaction he has procured.

"Third: A real estate broker may not make a separate charge for completing any standardized forms, and he may not prepare such forms for persons in transactions, in which he is not acting as a broker, unless he is himself one of the parties to the contract or instrument.

"Fourth: The required approval by counsel of standardized forms to be used in real estate transactions properly may be made either by lawyers selected by real estate brokers individually or selected by real estate boards of which they are members.

"Fifth: Even in transactions in which he is acting as a broker, a real estate broker may not give advice or opinions as to the legal rights of the parties, as to the legal effect of instruments to accomplish specific purposes or as to the validity of title to real estate; and he may not prepare reservations or provisions to create estates for life or in remainder or any limited or conditional estates or any other form of conveyance than a direct present conveyance between the parties, as provided for in standardized approved forms, to be effective upon delivery.

"Sixth: A real estate broker in conferring with parties to obtain facts and information about their personal and property status, other than is necessary to fill in the blank spaces in standardized forms necessary to complete and close transactions in which he is acting as a broker, for the purpose of advising them of their rights and the action to be taken concerning them, is engaging in the practice of law."

In reaching these conclusions the court examined the pertinent constitutional provisions, statutes, cases, and attitude of the American Bar Association, but seemed to base its decision largely on so-called practical reasons:

"However, this [broker's financial stake in the transaction] is also a practical reason why the completion of the contract is a part of the business of the real estate broker in the transaction; and it is usually to the interest of the seller he represents, as well as his own, to get a binding agreement completed promptly while the parties are together on its terms. Such agreements may be complicated and one or both of the parties may or should realize the need for a lawyer to prepare the contract rather than to use a standardized form; but more often they are simple enough so that

such a form will suffice and the parties will wish to avoid further delay or expense by using them. So much real estate business is done in this way, without harmful results, that we do not think the public interest requires it to be changed. . . .

"Likewise, general warranty deed and trust deed forms are so standardized that to complete them for usual transactions requires only ordinary intelligence rather than legal training. They are in fact less complicated than contracts for sale of real estate. We know that these forms are furnished to the public at the offices of Recorders of Deeds through the state. . . ."

The observations of the present writer which follow are not intended as an adverse criticism of the opinion and decision in *Hulse v. Griger*, an opinion the writer probably would adopt as his own if he were required to decide the question. The writer's observations are intended only to emphasize the point that every vendor and every purchaser as a matter of practice should be represented by competent counsel throughout every real estate transaction.

The key to a real estate transaction which can be closed smoothly and to the satisfaction of both vendor and purchaser is the contract of sale which embodies the agreement reached by prior negotiations and which covers the pertinent points overlooked in prior negotiations. The services of competent counsel are much more essential at this stage of the transaction than at closing, and both the vendor and the purchaser should be represented by counsel.

It is true, as the court observes in *Hulse v. Griger*, that much real estate business is done with printed form instruments filled in by real estate brokers without harmful results.⁴ But it also is true that many real

4. I have examined the 1953 copyrighted special form of real estate sale contract approved by legal counsel for the Real Estate Board of Kansas City, Mo., for use by active members of said Real Estate Board.

I am glad to say that it is one of the best printed form contracts I have seen, the form being reasonably complete and being reasonably fair to the purchaser as well as to the vendor. In most cases vendor and purchaser would run into no difficulty in using the form.

However, if I were representing a purchaser, I would recommend that he not sign the contract until it is amended in several respects. For example, the purchaser takes blindly under Clause 3 which provides: "Subject, however, to any recorded restrictions, easements, party wall agreements and community contract . . ." Suppose there is a recorded easement in favor of the city for a trunk line sewer down the middle of the lot which would prevent the purchaser from excavating from a basement; the exception as to recorded easements should be limited to recorded easements which will not materially interfere with the ordinary use and development of the property. Suppose there is a recorded restriction

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estate transactions are closed satisfactorily even though there is no written contract at all. It is the exceptional oral agreement which causes trouble; in fact, in some communities the vendor and purchaser ordinarily do not execute a written contract of sale in the usual transaction, but close on the basis of an oral agreement previously reached.

It seems to this writer that counsel should be retained to make the basic decision as to whether a standardized form is sufficient for the particular transaction. Once it is determined by a person competent to make the decision that all that is needed is to fill in *simple* blanks in a standardized form, it requires only ordinary intelligence rather than legal training to fill in the blanks.

With reference to contracts of sale, the court permits a real estate broker to fill "in the blank spaces to show the parties and the transaction which he has procured." Certainly the court had in mind simple blanks which can be filled in with a name, an address, a date, an amount, etc. Quære whether the court means to include the filling in of a long blank as to exceptions to good and marketable title, or a long blank in the purchase price clause where the parties have agreed on a note and purchase money deed of trust; the proper description in the contract of an installment note is a fairly complicated matter and requires a high degree of skill. It would seem to be clear that the real estate broker could not add any special conditions or other special clauses to the standardized form contract.

CONTRACTS FOR SALE OF REAL ESTATE—JOINDER OF SPOUSE OF VENDOR OR PURCHASER

In *Bobst v. Sons*⁵ a husband alone entered into a contract to convey certain land which was owned by husband and wife by entireties. The wife refused to join in the deed. The court held that the purchaser could recover damages from the vendor-husband for breach of contract, and that purchaser

unique as to one lot limiting its use; the exception as to recorded restrictions should be limited to usual and ordinary subdivision restrictions.

The several difficulties noted above can be handled by a special clause which describes the purchaser's intended use of the property and which provides that the purchaser at his election may avoid the contract if any recorded restriction, easement, zoning law, etc., will prevent or would materially affect the intended use.

Clause 5 makes general provision for a purchase money note and deed of trust. The difficulties with reference to the contract provision on such a note and deed of trust are noted in the text *infra*.

⁵ 252 S.W. 2d 303 (Mo. 1952).

need not show fraud or collusion between vendor-husband and his spouse. The court followed *Robinson v. Pattee*.⁶

From the points of view of both vendor and purchaser, before a contract for the sale of real estate is executed, the vendor's marital status should be ascertained. If the vendor is a man, the purchaser should not execute the contract unless the vendor's wife joins in the contract. Her joinder is important not only to make available to the purchaser the remedy of specific performance, but also to improve the chances of the purchaser being able to satisfy a judgment for breach of contract. As the cases above indicate, it is also in the vendor's interest that his wife join in the contract. If vendor and purchaser do execute a contract without joinder of the vendor's wife, the contract should make express provision as to whether the vendor shall be liable to the purchaser if the vendor's wife refuses to join in the deed.

If the purchaser makes an adequate down payment to cover liquidated damages, the joinder of the purchaser's wife is not necessary, except where the vendor is taking an unsecured note, or a note secured by a purchase money deed of trust, to cover part of the purchase price.

The contract itself should make provision for the other situations where the vendor is unable to comply with his obligation to convey a title good in fact and marketable in fact (or of record). In the typical case it would be fair to provide that the vendor who is in actual good faith shall not be liable to purchaser in the event there are title defects which cannot be cured. If the contract does not so provide, the only absolutely safe course for the vendor is to have his own title examined before he executes a contract to convey and then to contract to convey only such title as the examination shows him to have.

RESTRICTIONS ON LAND USE—ZONING LAWS

Section 89.020, *Revised Statutes of Missouri* (1949), is the basic statutory authority for municipal corporations with a population of 10,000 or more to zone property "for the purpose of promoting health, safety, morals, or the general welfare of the community." *Flora Realty & Investment Co. v. City of Ladue*⁷ is a case of great significance not only for Missouri but for other states, in indicating how far a municipal corporation can go in planned land utilization where the restrictions would seem to most persons to be only remotely related, if related at all, to health, safety and morals.

6. 359 Mo. 584, 222 S.W. 2d 786 (1949).

7. 446 S.W. 2d 771 (Mo. 1952).

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In a comprehensive zoning plan of the City of Ladue, District A, which included plaintiff's tract of 104 acres, was restricted to residential purposes with a minimum of three acres per family [e.g., a lot approximately 200' x 650']; the minimum area per family in District B was 1.8 acres [e.g., a lot approximately 200' x 390']; and so on through District E with a minimum of 10,000 square feet per family [e.g., a lot 60' x 167'], with even less stringent requirements in District F where a family could dwell on the second floor of any commercial building fronting twenty-five feet or more on a street.

In upholding the validity of the zoning ordinance as applied to District A (minimum of three acres per family), the court took into consideration the peculiar location and needs of Ladue. The court found the statutory requirements were met in that the comprehensive zoning plan was designed to lessen congestion in the streets, to secure safety from fire and other dangers, to promote health and the general welfare, to provide adequate light and air, and to facilitate adequate provision for transportation and other public requirements. The court rejected the contention that the zoning ordinance was an attempt to segregate economic classes. The court did not find it necessary to determine the validity of certain provisions respecting institutional uses.

The key sentence in the opinion is the following (emphasis added): "Further, the police power, as evidenced by the zoning ordinance, is not limited to the mere suppression of offens[ive] uses of property, *but may act constructively for the promotion of the general welfare.*"

RESTRICTIONS ON LAND USE—BY PRIVATE INSTRUMENT—BUILDING LINES

The case noted above went far in upholding restrictions on land use by way of zoning laws, but in marked contrast is another 1952 case on restrictions on land use by way of private instrument. In *Chiles v. Fuchs*⁸ the court applied the doctrine that restrictions upon the free use of real property are not favored and are strictly construed, and doubts in respect thereto are resolved in favor of the free use of the property. A subdivision was platted in March, 1925, and on the recorded plat was a certain broken line twenty scale feet back of the street line marked "20' Building Line." Following the leading case of *Zinn v. Sidler*,⁹ the court held that this broken line and the legend were not sufficient to create an effective restriction.

8. 249 S.W. 2d 454 (Mo. 1952).

9. 268 Mo. 680, 187 S.W. 1172, L.R.A. 1917A 455 (1916).

The contention in favor of an effective restriction also was based on a recorded instrument of restrictions in October, 1925, which provided in part as follows: "1. No building or other structure shall be erected nearer in the street upon which it fronts, than the building lines as shown on the plat of said subdivision . . . 3. Lots fronting . . . Hampton [the lots in question] shall be unrestricted . . . [Certain other lots] may be used for commercial purposes subject to the building line as shown on the plat. . . ." Clause 1 would seem to restrict the lots in question, but the first part of Clause 3 would seem to leave them unrestricted. The court resolved the conflict in favor of unrestricted use. The court did not rely on the latter part of Clause 3, which to this writer seems to strongly support the court's holding; when Clause 3 states that the lots in question shall be unrestricted as to their use and then goes on to say that certain other lots may be used for commercial purposes subject to the building line as shown on the plat, the inference is strong that the lots in question are not subject to a building line.

TRANSACTIONS RESERVING LIFE ESTATE AND POWER OVER FEE

Where a grantor wants to make a non-testamentary disposition of property during his lifetime, retaining an estate for his own life and certain powers of disposition over the fee, the transaction is not easy to effect. As a rule the person to take the fee is the natural object of the owner's bounty, and the owner expects that the reserved life estate will be sufficient for his needs, but he hedges against inflation or unexpected needs by making some provision for revocation or power to dispose of the fee. There also is the possibility that the natural object of the owner's bounty will predecease the owner and that under this circumstance the owner would prefer a different disposition of the fee.

Trust. If the property is of enough value to make a trust worth while, the trust technique would seem to be the most satisfactory method of handling the problem, not only from the point of view of substantive validity¹⁰ but also from the point of view of avoiding litigation for the construction of the instrument.

Legal Life Estate, Legal Remainder, with Power over Fee. A delivered deed where the grantor reserves a life estate and a limited power of dispo-

10. See *Sims v. Brown*, 252 Mo. 58, 158 S.W. 624 (1913); Note, *Validity of Trust Created by Nontestamentary Instrument reserving Benefit for Settlor for Life with Power of Revocation*, 78 A.L.R. 209 (1931).

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sition has been discussed previously by the present writer in his note on *Goins v. Melton*.¹¹ That case indicated that even a limited power of disposition included in an instrument in the form of a deed made the instrument testamentary in character.

In a recent case of great importance, *St. Louis County Nat. Bank v. Fielder*,¹² the court in an able opinion by Hyde, J., overruled *Goins v. Melton* insofar as that indicated that a limited power of disposition in the grantor made the instrument testamentary in character. The court upheld the validity as a deed of an instrument in the form of a deed which contained the provision, "The said party of the first part hereby reserves a Life Estate in and to said property, with power to sell, rent, lease, mortgage or otherwise dispose of said property during his natural lifetime," and where the grantor did not attempt to exercise any of the powers. The present writer thoroughly approves of the decision in this case.

The "deed" in the *Goins* case had an additional provision indicating its testamentary character: "At his death the title to all, or whatever part thereof remains unsold, to pass to and vest in the grantee together with all his personal property and belongings." The *Goins* case is not overruled insofar as the decision is based on this language indicating an intention to postpone until death the vesting of the fee.

Any lawyer who is drafting an instrument reserving a life estate and limited powers of disposition in the life tenant should thoroughly study the opinion in *St. Louis County Nat. Bank v. Fielder*. The case is the subject of a recent case note now being written by one of the Student Editors of the Missouri Law Review which will be published in a subsequent number.

The present writer suggests that consideration be given to an alternative technique, *viz.*, the owner grants in fee to a straw, who in turn reconveys to the former owner *for life*, with powers over the fee, and a remainder in default of the exercise of the power.¹³

Escrow Deed with Grantee's Name Blank, to be Filled in by Escrow Holder. An ingenious but abortive technique designed to accomplish the

11. 343 Mo. 413, 121 S.W. 2d 821 (1938); Eckhardt, *Work of Missouri Supreme Court for 1938—Property*, 4 Mo. LAW REV. 419 (1939). See also a more extended discussion of the case in Note, *Deeds—Creation of Future Interests—Reservation of Power of Sale*, 23 MINN. LAW REV. 683 (1939).

12. 260 S.W. 2d 483 (Mo. 1953).

13. See Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, 23 VERNON'S ANN. MO. STAT. p. 54, § 59. In addition to the authorities therein cited, see Moore, Comment, 17 Mo. LAW REV. 177 (1952).

same end, and new insofar as the present writer is concerned,¹⁴ is to put a deed in escrow with the grantee's name left blank, with instructions to the escrow holder to insert such grantee's name as the grantor might designate during his lifetime, but if he died without designating a grantee, to insert the name of a particular person, the natural object of the grantor's bounty; the escrow holder of course is to deliver the instrument after inserting the name. This appears to be what was attempted in *Ridenour v. Duncan*,¹⁵ although the testimony as to what actually was intended and happened was somewhat confusing. The court recognized the rule that a deed executed in blank may be filled in in conformity with grantor's parol authority, but held that the death of the grantor terminated the authority of her agent, and that there was no completed gift of the land to the grantor's son whose name was filled in after the grantor's death.

The holding of the case would seem to be sound under the particular facts where a gift was attempted. Quaere what the court would hold in a case where there is a written contract to convey for valuable consideration and pursuant thereto a deed is placed in escrow with the grantee's name left blank, the object being to have the escrow holder insert the name of the purchaser or the name of the purchaser's assignee when the sale is closed. Would the death of the vendor revoke the escrow holder's authority in such a case?

DETERMINABLE FEES AND POSSIBILITIES OF REVERTER

School consolidations and the cessation of user of small country school sites is resulting in a substantial number of cases involving determinable fees and possibilities of reverter, and several such cases reached the Missouri Supreme Court in 1952.

Determinable Fee or Fee Simple Absolute. Chouteau v. City of St. Louis,¹⁶ concerned with the old court house site in St. Louis, is a leading case in the United States as to whether a deed creates a determinable fee, a de-

14. This technique is new to me, but I can match it with another equally ingenious but abortive scheme for avoiding the administration of a decedent's estate that came to my attention about ten years ago. One layman advised each of his "clients" to execute a power of attorney which provided that it was to become effective at the death of the grantor of the power, the object being for the attorney-in-fact to close the decedent's estate without bothering with the probate court. If he had known about them, this layman no doubt would have dressed up the instrument with a power coupled with an interest, but without any greater likelihood of success.

15. 246 S.W. 2d 765 (Mo. 1952).

16. 331 Mo. 781, 55 S.W. 2d 299 (1932).

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feasible fee, or a fee simple absolute. That case was followed in *Fuchs v. Reorganized School Dist. No. 2, Gasconade County, Mo.*¹⁷ One Fuchs in 1892, "for and in consideration of the sum of One and no/100 Dollars" granted "unto the said School District on which to Keep and Maintain a Public School-House" a certain described acre, "To Have And to Hold . . . for the above purpose, forever." The heirs of the grantor brought an action to quiet title against the school district after abandonment of the acre for school purposes, on the theory the deed created a determinable fee with a possibility of reverter. Judgment for the plaintiff was reversed, the court holding that the school district had a fee simple absolute, the language in the deed not expressing a special limitation, but rather expressing the purpose or motivation of the grantor in conveying to the school district a fee simple absolute. Whether the plaintiffs owned the balance of the original tract does not appear in the statement of the case.

Occurrence of the Stated Event. Most special limitations as to school purposes were not drafted with precision. Often it is difficult to ascertain whether the event specified in the special limitation has occurred. In *Board v. Nevada School District*,¹⁸ the court considered the following special limitation: "It is expressly understood by this conveyance that the grantors herein convey the above for a school house site and whenever it is abandoned by the directors and ceased to be used for that purpose the title shall immediately revert to the grantors herein." The court after a careful evaluation of the evidence held that the stated event had not occurred even though there had been a consolidation and the school house in question had not been used for classroom teaching for over a year.

Improvements, Who Entitled. A problem on which there is very little authority is who is entitled to the improvements where there is a special limitation as to school purposes. *Board v. Nevada School District*¹⁹ is a case of first impression in Missouri on this problem. The improvements in question were the typical country school improvements, a school house, a coal shed, two toilets and a pump. The court laid down two principles: 1. prior to the occurrence of the stated event, the school district as the owner of a fee simple determinable has the rights of the owner of a fee simple and may

17. 251 S.W. 2d 677 (Mo. 1952).

18. 251 S.W. 2d 20 (Mo. 1952).

19. 251 S.W. 2d 20 (Mo. 1952). See also *In re Matter of Copps Chapel Methodist Episcopal Church*, 120 Ohio St. 309, 166 N.E. 218 (1929), a case in which the school district was given not only the buildings which it asked for but also the land which it did not ask for, in a very extraordinary opinion.

remove at will the improvements it has made, and is not chargeable with waste; and 2. after the occurrence of the stated event, the school district continues to own the improvements it has made, only the land in its unimproved condition reverting to the owner of the possibility of reverter. The court points out that there was no evidence that removal of the improvements would injure the freehold estate, and does not decide whether removal would be privileged if it would cause such injury.

Alienability of Possibility of Reverter. The problem of the alienability of possibilities of reverter in Missouri has been exhaustively treated by Murry L. Randall in the *Missouri Law Review*.²⁰ At common law the interest in the grantor descended to his heirs, but could not be alienated to a stranger (although it could be released to the owner of the determinable fee). Whether a possibility of reverter can be alienated to a stranger has not yet been decided in Missouri.

In the school cases, as a rule the person most concerned with the school parcel is the person who owns the balance of the farm out of which the school parcel was carved. Unless the original grantor or his heirs still own the balance of the tract, they usually have little or no interest in the school parcel. This writer is of the opinion that the possibility of reverter should be alienable at least in the case where it is conveyed along with the larger tract and is incidental thereto.

In *Board v. Nevada School District*,²¹ decided by Division No. 1, the plaintiff was one of the heirs of the original grantor and was grantee under a warranty deed from the other heirs. The court did not need to decide whether the possibility of reverter was alienable, and in fact did not mention the problem. In *Smith v. School Dist. No. 6 of Jefferson County*,²² another case decided by Division No. 1 on the same day, the court expressly reserved the question of the alienability of a possibility of reverter.

Even if the court should hold that possibilities of reverter are alienable, there often will be a difficult problem as to whether the owner of the possibility of reverter in fact did convey it. In *Smith v. School Dist. No. 6 of Jefferson County*, where the court expressly reserved the question of alienability, the court found the original grantor did not intend to convey the possibility of reverter in the school parcel when he conveyed the balance of the tract. In that case the school parcel was carved out of a 290 acre

20. Comment, 13 Mo. LAW REV. 76 (1948).

21. 251 S.W. 2d 20 (1952).

22. 250 S.W. 2d 795 (Mo. 1952).

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tract. He later conveyed the 290 acres by warranty deed in which the school parcel was specifically "reserved." The court reached the same conclusion with reference to a subsequent conveyance where the school parcel was "excepted." When the owner of the possibility of reverter conveys the tract which he owns in fee, the proper method would seem to be for him to convey the entire tract "subject to" the rights in the school district.

TAX TITLES—JONES-MUNGER

In *Journey v. Miler*²³ plaintiff claimed certain lots under a city collector's deed for lands sold in November, 1941, for delinquent taxes at third sale; this deed was dated and acknowledged November, 1941, but was not recorded until April, 1946, four and one-half years later. The trial court apparently decided against the plaintiff on the theory that he had no title because he failed to record the tax deed within four years from the date of sale, relying on Section 140.410, *Missouri Revised Statutes* (1949), and *Shaw v. Armstrong*.²⁴

Section 140.410 is the section which might seem to require the deed to be recorded within four years from the date of sale, and provides (emphasis added): "In all cases where lands have been or may hereafter be sold for delinquent taxes, penalty, interest and costs *and a certificate of purchase has been or may hereafter be issued* it is hereby made the duty of such purchaser, his heirs or assigns, to cause a deed to be executed and placed on record in the proper county within four years from the date of said sale; provided, that on failure of said purchaser, his heirs or assigns so to do, then and in that case the amount due such purchaser shall cease to be a lien on said lands so purchased as herein provided." In *Shaw v. Armstrong* the court itself noticed this section and applied it, as an alternative ground for its decision, to a 1943 third sale where the collector's deed was not executed until 1948.²⁵

In the principal case, *Journey v. Miler*, Hyde, J., points out that Section 140.250, as amended in 1939, no longer provides for a certificate of sale on a third sale, but rather provides for a collector's deed. Section 140.410, quoted above, which might seem to require the collector's deed to be recorded within four years of the date of the sale, is no longer applicable to a

23. 250 S.W. 2d 164 (Mo. 1952).

24. 361 Mo. 648, 235 S.W. 2d 851, 857-8 (1951).

25. Eckhardt, *Work of Missouri Supreme Court for 1950—Property*, 16 Mo.

third sale because no certificate of purchase is issued in such a case, and Section 140.410 by its terms applies only where a certificate of purchase is issued. *Shaw v. Armstrong* is overruled as to the applicability of Section 140.410 to a third sale.

The policy behind Section 140.410 is sound, and it would seem desirable that the General Assembly amend that section to cover the problem raised in the principal case.

TAX TITLES—LAND TAX COLLECTION LAW (Jackson County)

The marketability of tax titles under the Land Tax Collection Law, Sections 141.210-141.810, Revised Statutes of Missouri (1949), has been discussed in the *Missouri Law Review*²⁶ and in the *University of Kansas City Law Review*.²⁷ *Bennett v. Cutler*²⁸ is another step toward increasing marketability. The plaintiff, claiming under a deed from the Land Trust of Jackson County, brought a suit to quiet title. The defendant, the prior owner, asserted that the judgment of foreclosure in the suit under the Land Tax Collection Law was illegal and void because certain city taxes were illegally assessed in that the valuation for city purposes was higher than the valuation for state and county purposes.²⁹ The court held that this was a matter of defense that could have been raised in the tax suit, but that it was not a ground for a collateral attack on the tax proceedings in the subsequent suit to quiet title.

ADVERSE POSSESSION—MISTAKEN BOUNDARY LINE

Probably the most difficult problem in adverse possession cases is in connection with mistaken boundary lines, a problem frequently considered by the Missouri Supreme Court.³⁰ In *Sanderson v. McManus*³¹ the defendant claimed by adverse possession the south five feet of an adjoining lot on the north. The defendant's possession had its inception in an erroneous survey; part of the defendant's house encroached a foot on the plaintiff's lot and the eaves encroached more than two feet. The court affirmed a judg-

26. Eckhardt, *Work of Missouri Supreme Court for 1949—Property*, 15 Mo. LAW REV. 376, 377-379 (1950).

27. Scott, *Marketability of Tax Titles in Missouri*, 20 U. OF KAN. CITY LAW REV. 153 (1952).

28. 245 S.W. 2d 900 (Mo. 1952).

29. Mo. CONST. Art. 10, § 11 (1875); Mo. CONST. Art. 10, § 11 (a) (1945).

30. For discussions of the problem in Missouri, see the materials cited in Eckhardt & Peterson, *Possessory Estates, Future Interests and Conveyances in Missouri*, 23 VERNON'S ANN. MO. STAT. p. 81, § 97, n. 33 (1952).

31. 252 S.W. 2d 1351 (Mo. 1953).

ment that the defendant had acquired title by adverse possession. The court distinguished *Courtner v. Putnam*³² on the ground that in that case "defendant regarded the fence to be the true line, but intended to claim only to the true line wherever that might be regardless of where the fence was," while in the principal case defendant "claimed to the fence and its prolongation to the street regardless of the true boundary line." The court then goes on to say: "It is the intent to possess and not an intent to take from the true owner something the possessor knows belongs to another that governs." An important factor would seem to be the physical encroachment of buildings on the disputed strip. It is hoped that at some future date the court will abandon the distinction it makes between qualified and unqualified intent in the mistaken boundary line cases.

MINING LEASES

There are very few Missouri cases on the nature of interests under mining "leases." The problem was involved in one 1952 case considered by the Missouri Supreme Court and by the St. Louis Court of Appeals on transfer, *Thacker v. Flottmann*.³³ In a recent number of the *Missouri Law Review* Robert F. Pyatt has thoroughly considered the problems raised.³⁴

WATERCOURSES—RIGHTS OF RIPARIAN OWNERS

Rights of riparian landowners with respect to watercourses is a problem of increasing importance in Missouri, particularly in view of expanding industrial needs and increasing irrigation of agricultural land. Missouri has practically no reported cases on the problem. In a recent number of the *Missouri Law Review*, Paul A. Hanna has analyzed the Missouri authority on the problem,³⁵ in connection with his discussion of *Happy v. Kenton*.³⁶

Rights of upper and lower riparian owners with respect to irrigation was the case argued by the Junior Case Club finalists on Law Day in 1952 at the University of Missouri School of Law. Two of the finalists, Don E. Burrell and Donald G. Stubbs, who also are Student Editors of the *Missouri Law Review*, are preparing a comment on the problem for publication in a subsequent number of the *Review*.

32. 325 Mo. 924, 30 S.W. 2d 126 (1930).

33. 244 S.W. 2d 1020 (Mo. 1952); on transfer, 250 S.W. 2d 810 (Mo. App. 1952).

34. Note, 18 Mo. LAW REV. 61 (1953).

35. Note, 18 Mo. LAW REV. 67 (1953).

36. 247 S.W. 2d 698 (Mo. 1952).

TAXATION

ROBERT S. EASTIN*

The following is a summary, by subject matter, of the decisions of the Supreme Court of Missouri during 1952 in the field of taxation and related matters. While, as usual, not too numerous, several quite significant opinions were handed down during the year—more than in many recent years.

I. SUBJECTS AND INCIDENCE OF TAXATION

A. *Excise Taxes*

Monies received by a public utility from its customers as part of its charges for service, but "impounded" to await the outcome of rate litigation, are not "gross receipts" within the terms of the St. Louis tax on utilities, at least if later refunded.¹ However, if the tax was paid on total receipts, including "impounded" funds, during the years actually received, the utility is not entitled to deduct amounts later refunded from receipts for the year of refund, since each year must be treated separately for purposes of the tax and the refunds have no relation to receipts for the year of refund. The court left undecided the matter of obtaining a refund of taxes paid during the years of receipt.

The rule of *American Bridge Company v. Smith*,² that the Missouri Sales Tax does not apply to transactions involving the interstate delivery of goods, was reaffirmed in *Curtis Publishing Company v. Bates*.³ This result is based upon the language of the Missouri Act and not the Federal Constitution, so the decisions of the Supreme Court of the United States permitting a local sales tax on certain transactions involving interstate shipments are not controlling; and, while there have been certain amendments to the Sales Tax Act since *American Bridge*, they indicate no intent to change the rule.

Under Sections 3, 4 and 6 of Article X of the Constitution of 1945, the gross premiums tax levied upon life insurance companies, an excise tax, cannot be levied in lieu of the intangible personal property tax, a property tax. As a result, Section 148.370,⁴ which purports to accomplish this result, is

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1. *Laclede Gas Co. v. City of St. Louis*, 253 S.W. 2d 832 (Mo. 1952) (*en banc*).

2. 252 Mo. 616, 179 S.W. 2d 12 (1944).

3. 250 S.W. 2d 521 (Mo. 1952).

4. Mo. Rev. Stat. (1949) § 148.370.

unconstitutional.⁵ A property tax is entirely different in nature from an excise tax and the one is in no legal sense the equivalent of the other. As a result, the statute in question is deemed to establish an exemption of the intangible personal property of life insurance companies from property taxation, a result prohibited by the Constitution.

B. *Intangible Personal Property Taxes*

In *General American Life Insurance Co. v. Bates*,⁶ discussed just above, it was held that Section 146.010(4), *Missouri Revised Statutes* (1949), which provides that in determining the "yield" from intangibles owned by life insurance companies upon which the tax is based, there should be deducted that portion required by law to be credited to reserves, was valid, since the reserves of a life insurance company are in the nature of a trust fund for the benefit of its policyholders and are properly deductible in determining the value of its property for tax purposes.⁷

*In re Armistead*⁸ decided (1) that since the Intangible Tax Act⁹ did not become effective until July 1, 1946, the 1947 assessment, based upon the yield for the full year 1946, was unconstitutional, as retrospective legislation in violation of Section 13, Article I of The Constitution of 1945¹⁰ and (2) that the proceeds of life insurance policies held on deposit by the issuing company, to pay interest thereon to A for life, and the principal to B upon A's death, are "moneys on deposit" and taxable, as intangibles, to the life tenant, even though no part of the principal is withdrawable until the life tenant's death and though the settlement option in question was elected by the insured and no beneficiary had any election with respect thereto.

C. *Real Estate Taxes*

The ownership of real property by a city automatically renders it exempt from property taxes under Section 6, Article X of the 1945 Constitution (which is self executing), irrespective of its use. Thus, where the City of St. Louis acquired a large aircraft manufacturing plant at Lambert-St. Louis Airport, it was exempt from all taxes so long as that status continued,

5. *General American Life Insurance Co. v. Bates*, 249 S.W. 2d 458 (Mo. 1952) (*en banc*). See also under Part 1—B, *infra*.

6. *Supra*, note 5.

7. Cf. *State ex rel. Missouri State Life Insurance Co. v. Gehner*, 320 Mo. 691, 8 S.W. 2d 1068 (1928) (*en banc*).

8. 245 S.W. 2d 145 (Mo. 1952).

9. Chapter 146, Mo. REV. STAT. (1949).

10. *Following First National Bank v. Buchanan County*, 356 Mo. 1204, 205

notwithstanding the fact that it was leased to an aircraft manufacturing company and used in commercial pursuits.¹¹ Ownership and not use is the sole criterion.

II. LEVY AND ASSESSMENT OF GENERAL PROPERTY TAXES

*Ulman v. Evans*¹² is a type of case rather rare on the reports of this state—a direct review of a real estate tax assessment. It came up through the State Tax Commission and the Circuit Court of the City of St. Louis to the Missouri Supreme Court. The latter court held that (1) the general rule of review of the decisions of administrative tribunals, such as the Industrial Commission, is applicable to the review of orders of the State Tax Commission passing on assessments;¹³ (2) the formulas used by the assessor of the City of St. Louis, including one basing the value of real estate upon the square foot rental value of the first floor space in the building on the premises, were not unlawful in the absence of proof of systematic discrimination or an intentional overvaluation, or the equivalent and (3) the proof offered by the taxpayer was insufficient to show either systematic discrimination, intentional overvaluation or something legally the equivalent. A taxpayer who proposes to make a direct attack upon a real property assessment would do well to study this case with more care, especially in considering how much evidence he will need.

III. TAX SALES AND TITLES

Shaw v. Armstrong,¹⁴ decided in 1951, was overruled to the extent that it held that a purchaser's tax deed issued on the third sale of real property under the Jones-Munger Law (e.g. Section 140.250, *Missouri Revised Statutes* (1949)) must be recorded within four years from the date of sale or be invalid.¹⁵ The rule now established is that Section 140.410, which contains the four year filing requirement, is applicable only to sales at first and second offerings, where certificates of purchase are issued, and not to third offering sales where a deed passes at once. In the same decision, *Journey v. Miller*,¹⁶ the court considered what is necessary to give a purchaser of land notice of an unrecorded tax deed issued under the Jones-Munger Law. Since the instant sale was for city taxes and since the city ordinances with

11. *School District of Berkeley v. Evans*, 250 S.W. 2d 499 (Mo. 1952).

12. 247 S.W. 2d 693 (Mo. 1952).

13. Chapter 536, Mo. REV. STAT. (1949).

14. 361 Mo. 648, 235 S.W. 2d 851 (1951).

15. *Journey v. Miller*, 250 S.W. 2d 164 (Mo. 1952) (*en banc*).

16. *Qupra*, note 15.

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respect to delinquent taxes and the records thereof were not in evidence, the court reversed the case for further proof, but announced that in general it would follow the rule of *Fleckenstein v. Baxter*,¹⁷ decided under the law providing for the judicial foreclosure of state and county tax liens. What the eventual test will be under the Jones-Munger Law is therefore in some doubt but it certainly seems that very little showing other than a public record showing delinquent taxes and bearing notations as to tax sales should be required to place a subsequent purchaser on notice of the tax title.

In *Byrnes v. Scaggs*,¹⁸ *A* held record title to a tract and *B* claimed a portion of it by virtue of adverse possession. *A* sued *B* in ejectment, but the suit dragged along and, pending the suit, the property was sold for taxes under the Jones-Munger Law, where it was purchased by *C*. More than three years after the issuance of a tax deed to *C*, *B* had *C* made a party to the ejectment suit and sought to attack *C*'s title on the ground of grossly inadequate consideration. Following the 1951 decision of *Granger v. Barber*,¹⁹ it was held that Section 140.590, *Missouri Revised Statutes* (1949), prohibited an attack on a Jones-Munger tax deed for inadequacy of consideration more than three years after its issuance and that the pendency of the ejectment suit did not toll the statute, as the purchaser at the tax sale was, in effect, hostile to both parties to the ejectment suit.

The familiar rule that property in *custodia legis*, such as property held by a receiver, may not be sold for taxes without the consent of the court, was reaffirmed in *Davison v. Arne*.²⁰ This case was aggravated by the fact that one of the parties in the receivership proceeding was trying to benefit by the tax deed. His effort was, needless to say, unsuccessful.

As has been the case for several years, the Jackson County Land Tax Collection Act²¹ was before the court in several respects. In one case²² it was held that the Act was not unconstitutional as special legislation under either Section 40(21) of Article III or Section 8 of Article VI of the 1945 Constitution, since the Land Trust, created by the Act, was not a county or county officer or agency, and since the Act did not have reference to the "organization and powers" of counties.²³ The same case also held that the

17. 114 Mo. 493, 21 S.W. 852 (1893).

18. 247 S.W. 2d 826 (Mo. 1952).

19. 361 Mo. 716, 236 S.W. 2d 293 (1951).

20. 248 S.W. 2d 582 (Mo. 1952).

21. Mo. REV. STAT. §§ 141.210-141.810 (1949).

22. *Collector of Revenue v. Parcels of Land etc.*, 247 S.W. 2d 83 (Mo. 1952) (*en banc*).

23. See also *Inter City Fire Protection District v. Gambrel*, 360 Mo. 924, 231 S.W.2d 192 (1950). Missouri School of Law Scholarship Repository, 1953

provisions of the Act for the redemption of land from the tax lien were exclusive after an action had been brought thereunder and that the provisions of Section 140.120²⁴ were inapplicable in such a case. In *Bennett v. Cutler*²⁵ it was held that (a) the holder of the record title to land who was made a party to an action under the Act and served by publication, but who defaulted, could not later attack the tax foreclosure on the ground that certain of the taxes in question were illegally levied and (b) entry of a judgment of foreclosure does not so exhaust the powers of the circuit court that it might not, more than thirty days thereafter, enter an order re-setting the date of the sale thereunder.

IV. TAXING DISTRICTS

A. Organization and Regulation

School Districts. The 1947 School Reorganization Law²⁶ continues to create litigation. *Spiking School District No. 71 v. "Purported Enlarged School District R-II, DeKalb County,"*²⁷ in particular, caused a great deal of trouble to the court. The case was argued and submitted three times, once in division and twice *en banc*. It was finally held that a school district which had been included in a reorganized district under a reorganization plan might maintain a declaratory judgment suit to determine the validity of the reorganization proceeding, but that individual taxpayers could not, since a suit by the latter is but a collateral attack on the creation of the reorganized district. However, under the peculiar facts in this case, it was held that there was no school district in existence qualified to bring the suit, so it failed for want of a proper party plaintiff. As a result, the only remedy available was to induce the Attorney General to bring *quo warranto*.

The 1947 Reorganization Law²⁸ contained a very definite time schedule within which reorganization proposals were to be submitted and re-submitted to the voters. Notwithstanding, it was held (one judge dissenting) that these provisions were but directory and not mandatory and that reorganization proposals submitted to and adopted by the voters a short time after the lapse of the time specified in the law were validly adopted and the

24. Mo. REV. STAT. (1949).

25. 245 S.W. 2d 900 (Mo. 1952).

26. Mo. REV. STAT. §§ 165.657 to 165.707 inclusive (1949).

27. 245 S.W. 2d 13 (Mo. 1952).

28. See, for instance, 26 Mo. Rev. Stat. §§ 165.673 (2) and 165.693.

reorganized school districts created thereby were duly and legally organized.²⁹

A township treasurer may not refuse to turn over funds in his hands belonging to common school districts to a successor reorganized school district by reason of claimed defects in the establishment of the reorganized district, as this is but a prohibited collateral attack.³⁰

The provisions of Section 165.070, *Missouri Revised Statutes* (1949), relating to the arbitration of boundary and annexation disputes between school districts will be liberally construed and the provisions therein with respect to the time of taking action will be held directory only, at least where the delay was the result of litigation induced by the conduct of the party now relying on the delay.³¹

Other Taxing Districts. A drainage district is a public corporation which is at all times subject to regulation by the Legislature. Thus, though at the time of its organization such a district might be required by law to maintain bridges over its ditches and works, the Legislature may amend the law to relieve the district from this obligation, even though the amendment became effective after a suit had been brought to enforce the obligation.³²

B. Debt and Finances

The rule of *State ex rel. City of Dexter v. Gordon*,³³ decided in 1913, to the effect that in calculating the debt limit of a taxing district, the debt is "incurred" on the date the voters authorize the issuance of bonds, rather than the date upon which the bonds were issued, was followed in *State ex rel. Consolidated School District G-4 of Caldwell County v. Holmes*,³⁴ notwithstanding the interim adoption of the 1945 Constitution and the differences in language between Section 12, Article X of the 1875 Constitution, under which the *Dexter* case was decided and Section 26 (b) of Article VI of the new Constitution.

Voting booths are not a necessity in bond elections, at least if the ballot is short and the voter may easily conceal his ballot from others and if someplace apart from the judges and clerks is given him to mark it, and

29. *State ex rel. Rogersville Reorganized School District R-4 of Webster County v. Holmes*, 253 S.W. 2d 402 (Mo. 1952) (*en banc*).

30. *State ex rel. Burns v. Johnston*, 249 S.W. 2d 357 (Mo. 1952).

31. *State ex rel. Acom v. Hamlet*, 250 S.W. 2d 495 (Mo. 1952).

32. *Swisher Inv. Co. v. Brimson Drainage District of Grundy and Harrison Counties*, 245 S.W. 2d 75 (Mo. 1952).

33. 251 Mo. 303, 158 S.W. 683 (1913) (*en banc*).

34. 245 S.W. 2d 882 (Mo. 1952) (*en banc*).

the posting of notices of a bond election on power and light poles in rural areas may in a proper case be posting in a "public place" as required by the statute,³⁵ as what is a "public place" is relative and a question of fact in each case.³⁶

Cities may issue revenue bonds for the purpose of building extensions to their sewer systems and, in order to obtain funds with which to meet such bonds, may levy a charge for the use of the sewer system, though a part of the system may have theretofore been built out of the proceeds of general taxation.³⁷ The latter fact gives no person an absolute right to use the sewers without charge.

The contract of a county for the construction of a bridge is not void because of the fact that the county court adopted its budget for the coming year, in which provision was made for the bridge, prior to the date fixed therefor in the statutes,³⁸ even though the contract was executed before the statutory date for the adoption of the budget.³⁹

V. MISCELLANEOUS

*Kleban v. Morris*⁴⁰ points up the need for a general tax refund statute in Missouri. It happens that there is a provision for the refund of sales and use taxes improperly collected,⁴¹ which is more than can be said in many cases. *Kleban* involves the aftermath of a decision by the court in 1949 that the 1947 automobile use tax⁴² was unconstitutional.⁴³ Thereafter, the plaintiffs here, who had not filed claims for refund within one year of payment as required by the refund provisions *supra*, sued a galaxy of state officials, the State Treasurer, State Auditor, Director of Revenue, and Comptroller, as well as a depositary bank, seeking to impress a trust upon the funds collected under the unconstitutional law for the benefit of the persons who paid them. It was held that this was a suit against the state and that plaintiffs must be remitted to the Legislature for relief. While the

35. Mo. REV. STAT. § 165.040 (1949).

36. *Lake v. Riutcel*, 249 S.W. 2d 450 (Mo. 1952), following, as to the necessity of voting booths, *State ex rel. Wahl v. Speer*, 284 Mo. 45, 223 S.W. 655 (1920) (*en banc*) and *Breuninger v. Hill*, 277 Mo. 239, 210 S.W. 67 (1918) (*en banc*).

37. *City of Maryville v. Cushman*, 249 S.W. 2d 347 (Mo. 1952) (*en banc*) and *City of Sikeston v. Sisson*, 249 S.W. 2d 345 (Mo. 1952) (*en banc*).

38. Mo. REV. STAT. §§ 50.670 and 50.740 (1949).

39. *Adair County v. Urban*, 250 S.W. 2d 493 (Mo. 1952).

40. 247 S.W. 2d 832 (Mo. 1952).

41. Mo. REV. STAT. §§ 144.190, 144.200 and 144.260 (1949).

42. 2 Mo. Laws, 1947, p. 431.

43. *State ex rel. Transport Manufacturing and Equipment Co. v. Bates*, 359 Mo. 1002, 224 S.W.2d 1996 (1949).

Missouri Legislature has, in the past, been very fair about tax refunds, as a matter of principle there should be a general statute authorizing administrative claims for refund of all taxes unlawfully or improperly collected and permitting an action in court upon denial, similar to the Federal Statute. The present procedure is far too slow and cumbersome.

TORTS

GLENN A. McCLEARY*

The decisions during the year under review did not involve many new types of situations in which liability was claimed, but there was considerable clarification of various points of tort law in a number of instructive opinions. Special effort seemed to be made to make clear just what the law is in certain areas, making a number of the decisions worth careful study by the bar. Again, special emphasis has been given to the cases predicated on the humanitarian doctrine elsewhere in this issue of the Review.†

I. NEGLIGENCE

A. *Duties of Persons in Certain Relations*

1. Possessors of Land

In a well written opinion, in *Boyer v. Guidicy Marble, Terrazzo & Tile Co.*,¹ another exception is recognized to the general rule that a possessor owes no duty to trespassers for injuries caused by dangers on his premises. This was an appeal from a final judgment dismissing plaintiff's amended petition for personal injuries sustained by a 17 year old boy, as a result of an explosion of an apparently abandoned dynamite cap. The place where the cap was found, near the quarry in an apparently abandoned and "thrown away" condition, was open, unguarded, easily accessible to and frequented by children. It was further alleged that neither the plaintiff nor his 13 year old companion knew what they had found or that the caps were dangerous; that each believed the caps had been thrown away and abandoned; and that the caps were exploded two days later at the plaintiff's home. The court recognized that the plaintiff was not attempting to bring his case within the attractive nuisance doctrine, as there was no averment that the plaintiff was caused to trespass because he was attracted by an inherently dangerous

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1. 246 S.W. 2d 742 (Mo. 1952)

condition or instrumentality. An essential prerequisite to the attractive nuisance doctrine in Missouri is that the attractive nuisance caused the original trespass. The court placed its ruling on another exception to the general rule of nonliability of possessors to trespassers for injuries resulting from dangerous conditions on the premises, namely, that one handling extremely dangerous explosives owes a duty especially to children and those of immature judgment, irrespective of the fact that the status of the person may be that of a trespasser. "This recognition of a landowner's liability to a trespasser is not an extension of the 'attractive nuisance' doctrine," said the court, although "it may involve some of the basic consideration which prompted the 'attractive nuisance' doctrine, but it is, nevertheless, a rule independent of the 'attractive nuisance' doctrine." It was also held that the act of the 17 year old trespasser in removing the abandoned dynamite cap from the defendant's property, and his probing the cap with a nail, was not as a matter of law an intervening cause to break the chain of causation between the defendant's negligence and the plaintiff's injury.²

2. Carriers

Only occasionally does the court have the opportunity to consider a group of cases together which develop a legal problem in a way that is especially helpful to the profession. In each of the four cases, *Rohde v. St. Louis Public Service Co.*,³ *McDonnell v. St. Louis Public Service Co.*,⁴ *Grace v. St. Louis Public Service Co.*⁵ and *Lukitsch v. St. Louis Public Service Co.*,⁶ the plaintiff was a passenger on the defendant's busses. In each case

2. Other cases involving the liability of a possessor of premises for dangerous conditions thereon to business visitors: *Baker v. Kansas City Terminal Ry.*, 250 S.W. 2d 999 (Mo. 1952) (an action was against the railroad by an employee of an express company for injuries received when the right front wheel of a wagon, which the employee was pulling on a platform of the railroad station struck a board of a temporary bridge before the left wheel, causing the wagon tongue to jerk and throw the employee against a barricade. Evidence was held sufficient to make a jury issue as to whether the failure of the railroad to bevel the board sufficiently made the use of the platform unsafe for the purpose intended and constituted a failure on the part of the railroad to exercise ordinary care to keep it in a reasonably safe condition for use by the plaintiff); *Miller v. Brunson Construction Co.*, 250 S.W. 2d 958 (Mo. 1952) (an action by the employee of the principal employer against the contractor for injuries sustained when he fell through a plasterboard ceiling as alleged result of contractor's failure to take precautionary measures of maintaining barricade or constructing gangplank across the space from which the floor had been removed. The evidence was held sufficient to make a submissible case on the issue of negligence).

3. 249 S.W. 2d 417 (Mo. 1952).

4. 249 S.W. 2d 412 (Mo. 1952).

5. 249 S.W. 2d 409 (Mo. 1952).

6. 246 S.W. 2d 749 (Mo. 1952) (*en banc*).

the plaintiff predicated her action on the *res ipes loquitur* doctrine for injuries received when the defendant's bus suddenly stopped, or jolted, or gave an unusual and terrific jerk, causing the plaintiff to fall. In each of the four cases the defendant relied on the emergency doctrine as its defense and in each case the verdict was for the defendant. The emergency in each case was the result of an automobile driven into the path of the defendant's bus.

Since an integral part of the emergency doctrine, and a prerequisite to its application, is that the emergency shall not have been caused or contributed to by the tortious conduct of the person asserting the emergency as a factor to be considered in determining the reasonable character of the defendant's action, an instruction which allows the jury to consider the reasonableness of the driver's action in light of the emergency is prejudicially erroneous if it fails to preclude the possibility that the driver's negligence had caused or contributed to the emergency situation hypothesized in the instruction.

However, the court said in the *Rohde* case it is not necessary in a *res ipsa loquitur* case that the instruction "specifically negative all conceivable negligence of the defendant prior to the emergency; that freedom from any negligence in bringing about the emergency may be hypothesized generally. But whatever language may be used, general or specific, it must reasonably mean that the jury may not consider the emergency unless they find defendant free of any negligence in creating it." The court further held in that case that the phrase of the instruction requiring the finding "that the defendant was not negligent as charged in other instructions submitted to you herein" did not effectively require the jury to find, before applying the principle of the emergency doctrine, that defendant's negligence did not cause or contribute to cause the emergency. "This for the reason that . . . the jury has been specifically instructed in effect that they could consider the emergency situation in determining whether defendant exercised the highest degree of care after it arose without any inclusion in the hypothesis of the essential element of freedom from negligence in creating the emergency without which the emergency doctrine has no application. Having chosen to direct the jury's attention to a specific set of facts, defendant may not eliminate one essential fact and then attempt to supply it by a 'catch-all' phrase. This, at best, confuses and misleads."

In the *Lukitsch* case, the facts in and of themselves excluded any reasonable inference of negligence on the part of the bus operator in bringing about the emergency, since he could not reasonably anticipate the car would

suddenly swerve immediately in front of the bus. Therefore, "there was no necessity for including in an instruction the hypothesis that no negligence of the defendant caused or contributed to cause the emergency, and 'emergency' instruction omitting such a requirement is not erroneous."

How special circumstances may create an illusion of safety to render a railroad crossing peculiarly hazardous to an occupant of an automobile which collided with a motionless oil tank car at a grade crossing at night, were considered in *Albertson v. Wabash R. R.*⁷ The detailed facts showed a standing oil tank car, black in color, a slightly curving downgrade highway, no warning signals of any kind, and a cloudy night, if not misty and foggy. But there were additional circumstances creative of the illusion of safety. Here the Wabash crossing is at the southernmost edge of the town of Henrietta. It is in fact the "city limits" of the town and the beginning of open country. The motorist in traveling Highway 13, the highway also being the principal street of the town, "crosses the streets and passes the houses and business buildings of the village, and then the four or five tracks of the Santa Fe Railroad. Three hundred and sixty-one feet beyond the Santa Fe tracks, unexpected to the uninitiated, is the single, unlighted, unguarded Wabash crossing where even a careful driver might reasonably expect open country and an open road." The court held that reasonable minds could differ as to whether these special circumstances created an illusion of safety, and thus rendered the occupied crossing peculiarly hazardous to the plaintiff, who was an occupant of the automobile involved in the collision, so as to require precaution on the part of the railroad in addition to the mere presence of the standing train.⁸

7. 253 S.W. 2d 184 (Mo. 1952).

8. Other cases involving the liability of carriers which may be noted: In *Girratono v. Kansas City Public Service Co.*, 251 S.W. 2d 59 (Mo. 1952), the action was for injuries received when defendant's bus skidded into the plaintiff after plaintiff had stepped from it. The negligence submitted to the jury by the instruction was whether "the operator negligently started the bus forward in such manner as to cause it to skid upon the pavement and to strike and injure the plaintiff." This was held to be a submission of general negligence whereas plaintiff's petition contained charges of specific negligence. Furthermore, the mere skidding of an automobile or motor bus does not give rise to an inference of negligence.

In *Wood v. St. Louis Public Service Co.*, 246 S.W. 2d 807 (Mo. 1952) (*en banc*), evidence was held sufficient to go to the jury on defendant's negligence and plaintiff's contributory negligence, where the injuries to plaintiff motorist were received in a collision with defendant's streetcar, as a result of the rear wheels of the automobile being caught in the troughs or depressions in the street existing by reason of the rails of the track being depressed some 3" or 4" below the adjacent pavement, by ridges formed by ice at the respective edges of the pavement adjacent to the rails, and by the condition of the pavement adjacent to the rails. As plaintiff drove to the left into the space occupied by defendant's westbound track

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In cases predicated on the Federal Employers' Liability Act in state courts, carried through the state supreme court, and appealed to the United States Supreme Court, it is of more than passing interest to observe the attitude of the latter court as to the competence of the state judiciary in determining whether the plaintiff made a submissible case for the jury. In *Stone v. New York, C. & St. L. R. R.*⁹ the action was for injuries to plaintiff's back sustained when working as a member of a railroad section crew engaged in pulling ties while trimming the track. A judgment for \$50,000 was given in the trial court for the employee. The Missouri Supreme Court held the evidence insufficient as to whether the boss of the section crew could reasonably be charged with a duty of anticipating that plaintiff might be injured in any way by complying with the order to pull harder in extracting the railroad tie. Likewise, the evidence was held insufficient on the issue as to whether the number of men furnished was sufficient to enable

for the purpose of passing an automobile which was proceeding in front of him, he observed defendant's streetcar approximately 600' away. When plaintiff attempted to pull back into his traffic lane the defendant's streetcar was still 300' to 400' away and moving toward him. The streetcar had continued its approach at a constant speed of from 15 to 25 m.p.h. until it had reached a point about 6' to 8' from the point of collision, at which time the emergency stopping apparatus was applied. Negligence was hypothesized on violation of an ordinance requiring the defendant to keep in repair the space between the rails of its track and the space between the tracks, and on violation of the St. Louis vigilant watch ordinance.

Warning v. Thompson, 249 S.W. 2d 335 (Mo. 1952), was an action under the Boiler Inspection Act by an engineer who fell while performing his duty in going up on the locomotive catwalk and trying to get sanders to function in wet sand from the sanding mechanism. It was held that the railroad's liability for injuries resulting from the violation of a safety appliance act follows from the unlawful use of prohibited defective equipment, and not from the position the employee may be in, or work he may be doing at the moment of injury, where there is direct casual connection between the failure of the sanders to function and the resulting injuries.

Liability for injuries arising from failure to furnish railroad employees reasonably safe places to work was before the court in *Curtis v. Atchison, T. & S.F. Ry.*, 253 S.W. 2d 789 (Mo. 1952) (action for death of freight conductor when struck by defendant's train at night in unlighted rail yards, in which evidence justified finding that combination of darkness and cement obstruction, over which deceased had apparently tripped after swinging between standing box cars, created an unsafe place to work); and *Hatfield v. Thompson*, 252 S.W. 2d 534 (Mo. 1952) (action by freight train conductor for personal injuries sustained when attempting to board a moving train, allegedly caused by foot slipping in a hole in defendant's right of way, but instructions failed to hypothesize a finding of railroad's knowledge, actual or constructive, of the existence of the hole).

In *Cassano v. Atchison, T. & S.F. Ry.*, 247 S.W. 2d 786 (Mo. 1952), the action under the Federal Safety Appliance Act and the Federal Employers' Liability Act was for injuries to brakeman's back, allegedly sustained by overexertion in attempting to release the brake on a freight car in the defendant's freight yards.

9. 249 S.W. 2d 442 (Mo. 1952) *reversed* by the United States Supreme Court in 73 Sup. Ct. Rep. 318 (1953).
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workmen to do the work with reasonable safety and on the issue as to whether the methods used were reasonably safe. On certiorari to the United States Supreme Court, in an opinion by Mr. Justice Douglas, six of the judges disagreed with the Missouri appellate judges and held that the evidence of negligence and proximate cause was sufficient to go to the jury.

Of greater significance is the dissenting opinion by Mr. Justice Frankfurter, with whom Mr. Justice Reed and Mr. Justice Jackson joined, in which it is pointed out that Congress, in seeing fit that actions based on the Federal Employers' Liability Act be allowed in the state courts and in entrusting the enforcement of the Act to the state courts, "presupposed, as a generality, the competence of the judiciaries of the States, their professional capacity to enforce the Act and their self-critical fairness toward its purposes. When it thus put the enforcement of the law in the keeping of State courts, the Congress knew that the determination of whether there is adequate evidence to sustain a claim of negligence is one of the most elusive determinations that judges are called upon to make. To suggest that Congress knew this, and has known it right along, is not to indulge a fiction. Congress is composed predominantly of lawyers and this aspect of the law of negligence is known to the merest tyro. Congress could hardly have assumed when the Federal Employers' Liability Act of 1908 was enacted that this Court must reverse the State judges merely because we and they differed, where difference was more than permissible, was inevitable, concerning whether or not a particular unique set of facts made out a case of negligence." He points out that in assessing the unique circumstances of a case "right and wrong are not objectively ascertainable, that in fact there is no right and wrong when two equally competent and equally independent judges, equally devoid of any bias or possessed of the same bias, could by the same reasoning process reach opposite conclusions on the facts." Since he could not say that the Missouri Supreme Court could not hold on the facts that the plaintiff did not make a submissible case either for negligence or as to causation, he concluded that he would not substitute himself for that court in viewing the facts, although he probably would have taken the other view had he the independent primary responsibility.¹⁰

10. The writer of the dissent deplores negligence as the basis of liability under this Act "because of the injustices and crudities inherent in applying the common law concepts of negligence to railroading. To fit the hazards of railroad employment into the requirements of a negligence action is to employ a wholly inappropriate procedure—a procedure adequate to the simple situations for which it was adapted but brutally unfit for the situations to which the Federal Employers'

3. Automobiles

The liability of construction contractors who leave large motor-driven, earth-moving tractors in a public place at the end of a day's work was presented on a motion to dismiss plaintiff's petition in *Zuber v. Clarkson Construction Co.*¹¹ The action was for wrongful death of the plaintiff's father alleged to have been a result of being run over by a large earth-moving tractor, owned by the defendant, and which had been left in a public place (a levee or public place adjacent thereto near the densely populated area of a city) in such condition that the machine could be started and operated by curious and intermeddling members of the public and where the defendant was alleged to have knowledge that such persons were making a practice of operating machines, and had reason to anticipate that among those operators would be reckless and unskilled persons, and that some injury might result to others thereby. The trial court had sustained the defendant's motion and had entered a judgment of dismissal. It was held on appeal that the petition stated a cause of action in negligence. The court found that although the machines were of great economic value in public works, the probability and seriousness of foreseeable injury was so great that the cost of rendering the vehicle immobile by locks or other precautionary measures were not out of proportion to the hazard involved. The case is more adequately noted elsewhere in the *Review*.¹²

The court, in *Cantwell v. Zook*,¹³ reaffirmed its position taken in *Yates v. Manchester*,¹⁴ where an instruction was held erroneous which submitted the alleged negligent speed of the driver of an automobile without submitting fact issues to guide the jury in determining the issue of negligence and without requiring any finding of fact as to speed or existing circumstances. In the instant case, the action was for injuries resulting from a collision which allegedly occurred when the defendant's truck, parked on the side of the road, turned left into the path of the plaintiff's station wagon. The instruction in the instant case in submitting the issue of contributory negligence in-

Liability Act requires that it be put. The result is a matter of common knowledge. Under the guise of suits of negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation."

11. 251 S.W. 2d 52 (Mo. 1952).

12. Noted by Mr. Hanna in 18 Mo. L. REV. 205 (1953).

13. 250 S.W. 2d 980 (Mo. 1952).

14. 158 Mo. 894, 247 S.W. 2d 541 (1949).

formed the jury that if the plaintiff drove his vehicle, as he approached the truck operated by the defendant, "at a high, excessive and dangerous rate of speed under the circumstances, so as to endanger the lives and property of other persons including the plaintiff's, the plaintiff was negligent." This was held to be erroneous.

There were other cases growing out of automobile collisions which may be read with profit when drafting instructions although one of them raises new points of law. These are cited in the footnotes.¹⁵

4. Supplier of Articles

The liability of a supplier of articles was raised in two cases, one of which covers a large area of the law on this subject. In *Willey v. Fyrogas*

15. A helpful case to read in drafting a sole cause instruction is *Godfrey v. Bauer*, 252 S.W. 2d 281 (Mo. 1952). To the writer, the position taken in this case as to the sufficiency of the sole cause instruction indicates a more moderate attitude on the part of the court from the earlier cases in this field. However, the basic requirements for a sole cause instruction are no less required.

The court, in *Le Grand v. U-Drive-It Co.*, 247 S.W. 2d 706 (Mo. 1952), reiterates its rule with regard to the giving of the following cautionary instruction: "The court instructs the jury that the mere fact of itself that plaintiff was injured and has brought suit claiming defendants were negligent is no evidence whatever that the defendants were in fact negligent. Negligence is not in law presumed, but must be established by proof as explained in other instructions. Neither are you permitted to base a verdict entirely and exclusively on mere surmise, guesswork and speculation; and if upon the whole evidence in the case, fairly considered, you are not able to make a finding that defendants were negligent without resorting to surmise, guesswork and speculation outside of and beyond the scope of the evidence, and the reasonable inferences deductible therefrom, then it is your duty to, and you must, return a verdict for the defendants."

In *Young v. Anthony*, 248 S.W. 2d 864 (Mo. 1952), plaintiff's instructions requiring defendant motorist to exercise the highest degree of care while requiring of plaintiff motorist only due care were held to be prejudicially erroneous as unduly emphasizing the care required of defendant and minimizing that required by plaintiff, and such error was not cured by a definition of due care as used in the instructions as meaning the highest degree of care or by the defendant's conflicting instructions requiring plaintiff to exercise the highest degree of care.

In drafting an instruction by the defendant on the emergency doctrine, facts must be hypothesized which exclude any negligence of the defendant in creating the emergency. In *Boatright v. Bruening*, 251 S.W. 2d 709 (Mo. 1952), an action for injuries sustained by the plaintiff when the automobile in which he was riding collided with defendant's on-coming vehicle, an instruction properly submitting defendant's theory that his act in turning to the left across the white line in the center of the street, which was the sole act of negligence submitted by the plaintiff as being negligent, took place after the emergency arose and because of it (the facts showing the creation of the emergency solely by the acts a third party so suddenly) and that nothing defendant did or failed to do could have contributed to cause it, excluded any reasonable inference of negligence on the part of the defendant in creating the emergency. The case may be quite profitably compared with the discussion of the emergency doctrine in *Rhode v. St. Louis Pub. Serv. Co.*, note 3, *supra*; *McDonnell v. St. Louis Pub. Serv. Co.*, note 4, *supra*; *Grace v. St. Louis Pub. Serv. Co.*, note 5, *supra*; and *Lohmeyer v. St. Louis Pub. Serv. Co.*, note 6, *supra*.

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Co.,¹⁶ the action was for the death of plaintiff's husband in a propane gas explosion, on the ground that the automatic cut-off valve on the hot water heater was defective and permitted gas to escape. The explosion of the gas in the basement of their home occurred when the deceased attempted to relight the pilot light on the automatic gas water heater. The action was against the manufacturer of the valve, the manufacturer and assembler of the heater, the retailer, and the intermediate vendor (variously characterized in the opinion as a wholesaler or distributor or manufacturer's agent), which was the only defendant residing in the county where the suit was brought. The negligence and liability of the manufacturer of the heater and the retailer were submitted to the jury and a verdict returned for the plaintiff. At the close of the evidence the trial court had directed verdicts for the manufacturer of the valve and the intermediate vendor who effectuated the sale to the retailer of the plaintiff. The two defendants to the judgment appealed and the plaintiff appealed from the directed verdicts in favor of the other two defendants, thus the liability of all four defendants was before the supreme court. It is not possible within the limits of this survey to treat fully of the liability of each defendant, as is done in the opinion. The distributor or wholesaler was not liable because he did not know and had no reason to know that the valve on the heater was defective, the heater being still in the original crate and paper bag when it reached the retailer. The liability of the manufacturer of the heater, which incorporated this component part manufactured by another, and the liability of the manufacturer of the part (the defective valve) were recognized, and it was held to be no defense to the manufacturer's negligence in constructing the article or in failing properly to test and inspect it that the retailer was also under a duty to make tests and had in fact made a 'functional test' of the automatic cutoff valve. "The failure of the vendee to properly inspect and test is within the foreseeable risk of the manufacturer." However, because of error in the instructions a new trial was granted to the manufacturer of the heater and to the retailer.

In Spurlock v. Union Finance Co.,¹⁷ the action was by a prospective buyer of a used automobile against the automobile dealer for injuries sustained when the buyer poured gasoline, which had been given to him by the dealer's agent, into the carburetor of the automobile in which he was interested while his companion stepped on the starter. Negligence of the

16. 251 S.W. 2d 635 (Mo. 1952).

17. 248 S.W. 2d 578 (Mo. 1952).

agent was predicated on failing to warn of the inherent danger when he gave the prospective buyer the gasoline and instructed him to pour it into the carburetor so as to start the automobile. The court also held that the agent's alleged ignorance in regard to such danger did not excuse his failure to warn prospective buyers. The judgment entered for the defendant on its motion for judgment notwithstanding the verdict for the plaintiff was set aside, and the cause was remanded to the trial court with directions to reinstate the verdict of the jury and to enter judgment in favor of the plaintiff.

5. Imputed negligence

In the two cases before the court in which the plaintiff claimed damages for personal injuries from the defendant on the doctrine of *respondeat superior*, the acts of the employee fell outside the scope of his employment. In *Roth v. J. N. Roth & Co.*,¹⁸ the plaintiff was injured when the automobile in which she was riding crashed into an embankment, as her husband, who was driving, attempted to avoid a collision with an automobile driven by the defendant. The action was against the corporation of which plaintiff's husband was president. He was driving his own automobile at the time of the accident on a business trip for the corporation. The court held that where the president of a corporation, who was making an automobile trip for the exclusive business of the corporation, extended an invitation to his wife to accompany him, not for any purpose of the corporation, but solely for his own pleasure, the scope of his authority did not include the transportation of persons as passengers or guests and he had no implied authority to invite others to ride with him. The judgment in favor of the plaintiff against the defendant corporation was reversed, the trial court having committed error in refusing to direct a verdict in favor of the defendant.

In *Brown v. Moore*,¹⁹ the automobile was operated by a salesman in the general employ of the defendant. While the car was owned by the employer, the employee was permitted to retain the car in his possession and to use it for his own private purposes on payment of a fee and reimbursement of gasoline on a mileage basis. The employee had written a letter to his employer in relation to an order and had taken the letter with him when he left his home, intending to mail it in Kansas City. He first purchased stamps in Hickman Mills and then drove south three miles on Highway

18. 253 S.W. 2d 802 (Mo. 1952).

19. 248 S.W. 2d 999 (Mo. 1952).

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71 to Grandview to purchase a case of beer for a private party that evening. After purchasing the beer, he started back north on the same highway toward Hickman Mills, still having the letter with him. He was still going to Kansas City for the purpose of mailing the letter, and he expected to take the beer to Kansas City, then return to Hickman Mills. The court held that the employee had materially deviated from his master's business for the six mile round-trip on Highway 71 on private business, and that he had not yet returned to the point of deviation when the collision occurred. "He was not on a merely circuitous journey to mail the letter. . . . The deviation was definite and certain, out and back to the starting point." Therefore, as a matter of law the employee was not within the scope of his employment when the collision occurred. The ruling of the trial court in sustaining the employer's motion to set aside the verdict and judgment for the plaintiff and to enter judgment for the defendant was affirmed.

B. *Negligence under the res ipsa loquitur doctrine*

Whether the plaintiff may rely on the doctrine *res ipsa loquitur* in an action for personal injuries suffered from an explosion of gasoline on defendant's premises, was the question in *Carter v. Skelly Oil Co.*²⁰ The petition alleged that the defendants drove the plaintiff's automobile into their lubrication room for service and repairs, closed the outer doors thereof, caused the automobile to be raised upon their hydraulic grease rack, drained from it approximately ten gallons of gasoline onto the floor of the lubrication room and pushed the gasoline along the floor with a squeegee, and negligently allowed the gasoline to explode, injuring the plaintiff who was impliedly present in the lubrication room. It was further alleged that the lubrication room was equipped with a kerosene heating stove and the outdoor temperature was 43 degrees. The court recognized defendant's contention that the mere fact of an explosion does not make out a prima facie case of negligence, or raise the inference of negligence under the *res ipsa loquitur* theory. However, if "in addition to the explosion, there are other facts and circumstances from which the jury reasonably may infer that the explosion was caused by a flame or spark emanating from an instrumentality under the management and control of the defendants, then their negligence may be inferred." The petition was held to have stated a cause of action under the *res ipsa loquitur* doctrine.

A number of cases raised the troublesome question of whether plaintiff's

evidence disclosed specific negligence and thus lost for the plaintiff the benefit of submitting the case under the doctrine *res ipsa loquitur*. In *Lukitsch v. St. Louis Public Service Co.*,²¹ the court *en banc* considered the case of a passenger against the bus company for injuries sustained in falling to the floor of the bus when the brakes were suddenly applied. Although the court *en banc* has subsequently in the case of *McCaferly v. St. Louis Public Service Co.*²² limited its holding on the point, the *Lukitsch* case is important to an understanding of the cases subsequently discussed herein. The majority of the court *en banc* held that the plaintiff debarred herself from the right to recover under *res ipsa loquitur*, where she proved by her own evidence that the jerk of the bus was caused by a sudden application of the brakes to avoid hitting an automobile which had pulled in front of the bus. "The facts in the case at bar, in and of themselves," said the court, "exclude any reasonable inference of negligence on the part of the bus operator in bringing about the emergency and that he could not reasonably anticipate the car would suddenly swerve immediately in front of the bus. . . ." Three of the judges dissented on the point that the case was converted from a *res ipsa loquitur* application to specific negligence for the reason that the plaintiff's proof did not make a jury case on specific negligence. Judge Hyde, with whom Judge Leedy and Judge Dalton concurred, reasoned that the "plaintiff's proof must be sufficient to make a jury case on specific negligence before the case can be changed from *res ipsa* to specific negligence. The rule is that 'even though the plaintiff's evidence may tend to show the specific cause of the accident, he will nevertheless not lose the benefit of the doctrine, nor be deprived of the right to rely upon it in the submission of his case, if, after his evidence is in, the true cause is still left in doubt or is not clearly shown. . . .'" It was pointed out that "The reason for the rule is that 'a plaintiff can neither definitely state nor show that his injury was caused in a certain way and then allow the jury to speculate on whether it was caused in some other way.' . . . Surely a plaintiff has not clearly and definitely shown the specific act of negligence that caused his injury if his evidence is not sufficient to make a jury case on the issue." The minority view did not think that reference in the plaintiff's evidence to a sudden application of the brakes may be said to have so clearly pointed out and identified any specific act of negligence on the part of the operator of the

21. 246 S.W. 2d 749 (Mo. 1952) (*en banc*).

22. 252 S.W. 2d 661 (Mo. 1952) (*en banc*).

bus as to have constituted a waiver of plaintiff's right to rely upon the doctrine *res ipsa loquitur*.

In *McDonnell v. St. Louis Public Service Co.*,²³ decided a month later on almost identical facts, the court in division said "It is unnecessary to determine whether this evidence constituted proof of specific negligence. We may say by way of dictum that it did not. This for the reason that while the testimony showed the *cause* of plaintiff's fall, in the sense that it showed the fall resulted from the physical act of the operator in making a sudden application of the brakes, it did not prove the specific *negligent cause*, if any, which caused or contributed to cause plaintiff's injuries." (Italics the courts) The opinion then seeks to exclude this case from the possible broader interpretation of the *Lukitsch* case above as follows: "There is language in the recent majority opinion of the Court en Banc in *Lukitsch v. St. Louis Public Service Company* . . . which indicates that proof that a sudden application of the brakes may under certain circumstances constitute proof of specific negligence. This language, however, was, as we shall point out, unnecessary to the conclusion of the court as to the instruction there involved. . . . So viewed, we think the *Lukitsch* case holds, on the question of proof of specific negligence, that where the facts of a case have excluded every reasonable inference of negligence, other than negligence, if any, in the *manner* in which the brakes were applied, proof that a jerk was caused by sudden application of brakes is proof of specific negligence." In the instant case the court found that neither plaintiff's evidence nor defendant's evidence nor all the evidence excluded a reasonable inference of negligence on the part of the bus operator in causing or contributing to cause the emergency.

The same contentions were made by the parties in *McCaffery v. St. Louis Public Service Co.*²⁴ There the plaintiff as a passenger on defendant's streetcar was standing and had her hold on the bar on the back of the seat torn loose, causing her to fall, when the streetcar jolted. The court *en banc* clears up any confusion which would arise from an apparent difference in a holding on this point made on a divisional opinion over an earlier *en banc* opinion by adopting the analysis made in the divisional *McDonnell* case discussed above. Furthermore, the court in the instant case, after quoting the language in the *Lukitsch* case on this point, states that "These expressions, standing alone, do apparently mean that when a passenger-plaintiff shows by evidence that a sudden stop of a vehicle was caused by the operator

23. 249 S.W. 2d 412 (Mo. 1952).

24. 252 S.W. 2d 361 (Mo. 1952) (*en banc*).
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applying the brakes, then such plaintiff has thereby proved specific negligence. Our opinion in the instant case is in conflict with Lukitsch in so far as that case holds and to that extent the Lukitsch case should be overruled."

A few months later, in *Williams v. St. Louis Public Service Co.*,²⁵ the court *en banc* ruled similarly where the plaintiff sustained injuries while riding as a passenger on defendant's streetcar, when the operator of the car was alleged negligently to have caused it to check its speed suddenly and to receive an unusual jerk which caused the plaintiff to fall. The plaintiff's testimony indicated that the streetcar was slowed to permit an automobile to pass across in front of it; that then the streetcar started forward; and that was when the jerk occurred. However, the court held that the evidence did not show what caused the jerk. It did not show whether the jerk was caused by a negligent application of the power or to a negligently maintained transmission system, even if it be conceded that an inference could be drawn from the evidence that the jerk was due to the application of power to the transmission system.

C. Defenses in negligence cases

In the usual negligence case, whether the plaintiff was contributorily negligent is a jury question. Only in cases where the court has declared the plaintiff contributorily negligent as a matter of law may special notice be given in a survey of this nature. In *Clark v. Missouri Natural Gas Co.*,²⁶ the court *en banc*, in reversing a judgment for the plaintiff, held that a pedestrian, who had become cognizant earlier in the evening of a gas pipe obstructing the sidewalk, and who subsequently on the same evening fell over such obstruction, was contributorily negligent as a matter of law. In *Chisenall v. Thompson*,²⁷ a plaintiff who had lost his right hand when he attempted to remove cornstalks from between revolving rollers of a corn picker without first placing the power take-off lever in neutral, and who fully understood the safe way and the dangerous way to clean a corn picker, yet chose the dangerous method, was contributorily negligent as a matter of law. A judgment for the plaintiff was reversed in both cases.

In *Brandt v. Thompson*,²⁸ the court reversed a holding of assumption of risk by the trial court and ordered the judgment for the plaintiff reinstated, where the action was for injuries sustained as a result of falling on the stair-

25. 253 S.W. 2d 97 (Mo. 1952) (*en banc*).

26. 251 S.W. 2d 27 (Mo. 1952) (*en banc*).

27. 252 S.W. 2d 335 (Mo. 1952).

28. 252 S.W. 2d 369 (Mo. 1952).

way of an office building of the defendant. The plaintiff was employed by a tenant which occupied the third floor. The evidence showed that the elevators in the office building were always full at five o'clock in the afternoon and would not stop for those employees on the third floor until about five-fifteen o'clock. It was therefore customary for those employees to walk down a poorly lighted stairway which had no handrails. The plaintiff slipped on a step which had been worn slippery. The court said that "a person may be declared negligent as a matter of law only if a stairway was so 'glaringly' dangerous that no reasonable prudent person would use it." But the circumstances here were such that a jury could have concluded that the plaintiff acted reasonably. She had used these steps every day for two or three years without mishap; when she started down the stairs she did not know the light was out on the second floor; if she elected to go back up the stairs she would have had to traverse the same darkened and slippery stairs and would have had to encounter persons coming down the stairs, rendering her passage against the stream of traffic confusing and dangerous to herself and to others. Furthermore, she had little time to deliberate as three persons were coming along behind her only a step apart.

D. Humanitarian Doctrine

In view of the significance of the humanitarian doctrine in the Missouri decisions, special emphasis has been given to the cases predicated on this doctrine in a separate topic to be found elsewhere in this issue of the *Review*.²⁹

II. TRESPASS

*Beetschen v. Shell Pipe Line Corporation*³⁰ was an action brought by landowners against the pipe line company to recover damages for trespass

29. Discussed by Mr. Becker. For difference between submitting plaintiff's case on negligence under the humanitarian doctrine and on a theory of willful, wanton or reckless misconduct see *McClanahan v. St. Louis Service Co.*, 251 S.W. 2d 704 (Mo. 1952) (*en banc*) (overruling a number of Missouri decisions improperly submitted under the humanitarian doctrine as not involving humanitarian negligence: "It seems to us the wrongful acts or conduct noted in the respective cases brought plaintiffs into imminent peril, yet the acts or conduct of the respective defendants either immediately caused the plaintiff's injuries, or the plaintiffs were injured as the result of the defendants' acts or conduct so near to the time plaintiffs were in imminent peril that defendants were liable, if at all, not for negligence under the humanitarian rule but for their primary conduct amounting to negligence, or amounting to willfulness, wantonness or recklessness."). For an interesting decision interpreting whether the defendant's conduct constituted a "wanton negligence" under the Kansas guest statute, see *Tillman v. Zumwalt*, 250 S.W. 2d 142 (Mo. 1952) (transferred to the court *en banc*, following an equal split in division over whether the trial court's direction of verdict for the defendant at the close of plaintiff's case should be sustained).

when the company mistakenly fenced part of the company's pipe line right of way, though the company had only subsurface rights as a result of condemnation. The plaintiffs recovered actual and punitive damages over the defendant's contentions that it possessed the power of eminent domain and could have condemned the right to fence, and having appropriated that right without authority the taking or fencing was permanent and, therefore, the landowners were bound to seek their entire recovery in one action for all the damages sustained.

In *Curtis v. Fruin-Colnon Contracting Co.*,³¹ to build a retaining wall around a lot, defendant without asking plaintiffs' permission dug a ditch partly on plaintiffs' property as much as 18 inches, which was less than two feet from the north part of their buildings and about seven feet from the south part. The north part had an L about 27½ feet wide which extended about six feet farther west than the south part. According to the plaintiffs' evidence, this ditch was about three feet wide and about four feet deep and was dug along the west side of plaintiff's building. The ditch had no outlet and the soil was sandy and porous. There was considerable rain during the spring and summer, and water collected in the ditch and seeped from it into the ground. This action was in trespass and negligence for the cracking of the foundation to the plaintiffs' building and the settling of the building, which was allegedly due to the seepage from water which had collected. The negligence charged was in leaving the entire ditch open for about three months, in soil of this type, without an outlet, when water accumulated and seeped under the foundation of plaintiffs' building. On both issues plaintiffs were held to have made a submissible case. However, a retrial on the issue of damages only was granted due to error in instructing the jury on the measure of damages which permitted the jury to take into consideration the reasonable value of the repairs necessary to restore the building in a condition as good as it was in immediately prior to the damage. "The general rule," held the court, "is that the measure of damages to real estate is the difference in the value of the land before and after the injury by trespass or negligence. However, where damaged land or a building thereon can be restored to its former condition, at a cost less than the diminution in value, the cost of restoration may be recovered. Thus this restoration rule of recovery is applicable only to cases where the cost of restoration is less than the difference in the value of the land before and after the injury and

can never apply in any case where the cost of restoration is greater than the value of the land or building."

III. MALICIOUS PROSECUTION

In an action for malicious prosecution the plaintiff must allege and prove, as one of the elements of his cause of action, that he was not guilty of the criminal offense with which he was charged, and that the criminal proceedings terminated in his favor. In *Cowan v. Gamble*,³² a petition failed to state a cause of action where it was alleged that the petitioner, who was charged in Oklahoma with the felony of child stealing and against whom a warrant of extradition had been procured in Missouri, had been discharged on habeas corpus, since this was not an allegation of the termination of the criminal prosecution in his favor in the Oklahoma proceedings. The habeas corpus proceedings, held the court, challenged only the validity of the petitioner's detachment under the extradition warrant, and did not challenge the legality of his original or impending detention in Oklahoma and did not preclude the possibility of conviction there.

WILLS, TRUSTS AND ADMINISTRATION

GEORGE W. SIMPKINS*

During the calendar year 1952 the Missouri Supreme Court decided several cases in the field of Wills, Trusts and Administration of material significance to the practicing lawyer, especially certain cases involving hitherto undecided questions of procedure and cases further developing the law with respect to the right to attorneys' fees.

I. POWER OF PROBATE COURT AND PROCEEDINGS THEREUNDER

In re *Hoerman's Estate*¹ holds that a mother of an insane son converted to her own use monthly disability payments under his war risk insurance policy was liable to repay such amounts. In an attempt to avoid such liability, it was contended that the probate court might make allowances out of the ward's estate to support members of his family. The case is of very considerable importance in this respect since it is the first time that this question has been before the Supreme Court of Missouri. The court said:

"Appellants particularly rely upon State ex rel. Kemp v. Arnold, 234 Mo. App. 154, 113 S.W. 2d 143, 145. However, it was recognized in that case that the Probate Court 'is a court of limited

32. 247 S.W. 2d 779 (Mo. 1952).

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1. 247 S.W. 2d 762, 764 (Mo. 1952).

jurisdiction, possessing only those powers which have been conferred upon it by statute, and being wholly without equitable jurisdiction, even though it is permitted, when necessity arises, to apply mere equitable principles in the exercise of its statutory jurisdiction.' It was held therein that the provision of Sec. 458.140 (statutory references are to R. S. Mo. 1949 and V.A.M.S.) for the Probate Court to make an order, in the estate of an insane person, 'for the support and maintenance of his family,' was authority for providing for the support of the widowed mother of the incompetent out of his estate. The Court held the word 'family' should be construed to include 'whomsoever it is the natural or moral duty of the head of the family to support, or who is dependent upon him for support.' In that case, the incompetent had for many years maintained his home with his mother and had regularly contributed to her support the amount of the allowance sought. Furthermore, in that case the Court only decided that the Probate Court had authority to make an allowance and did not pass on the question of what allowance should be made. It is certainly no authority for making retroactive allowance for a past period during which allowances were made from time to time in the light of the facts and conditions then existing.

"There are conflicting cases, some of which appellants cite, on the right of courts to make allowances from an incompetent's estate for persons to whom he is under no legal obligation to support. See *Citizens' State Bank of Trenton v. Shanklin*, 174 Mo. App. 639, 161 S.W. 341; *In re Heck's Guardianship*, 225 Wis. 636, 275 N.W. 520; *In re Beilstein*, 145 Ohio St. 397, 62 N.E. 2d 205; *In re Flagler*, 248 N. Y. 415, 162 N.E. 471; Annotations 59 A.L.R. 653, 160 A.L.R. 1435; 25 Am. Jur. 52, Sec. 79; 44 C.J.S., *Insane Persons*, § 90, page 242. Chancery Courts have been less restricted in making such allowances than courts acting under statutory authority. It is stated: 'Great caution should be exercised with respect to making allowances to persons for whom the ward is not legally bound to provide; and it has been said that the practice ought rather to be narrowed than extended.' 44 C.J.S., *Insane Persons*, § 90, page 243. Since the only authority for making such an allowance in this State is Sec. 458.140, we do not think it can reasonably be construed to authorize what was done here. In the first place, the allowance made by the Probate Court includes eight years (1919-1927) during which Mrs. Hoerman was living with her husband on the farm (1919-1923) and in Smithton (1923-1927). All the evidence shows that she was not dependent upon her son during that time. Furthermore, there was no evidence before the Probate Court that the allowances thereafter made by it were insufficient or that she needed more than was allowed by it, when these previous allow-

ances were made. In fact, the evidence is the other way: namely, that she had sufficient means not only for her own support but enough to contribute to the support of other children. We must, therefore, hold that the evidence before the Probate Court was insufficient to support this additional retroactive allowance."

*Williams v. Vaughn*² holds that where a guardian of an insane ward, without express court approval, borrowed money which was then paid out for lawful purposes, the lenders were entitled to recover from the estate of the insane ward who had since died the amount of the loans, saying:

"We do not understand that the appellant contends that the above enumerated items are not proper charges against the estate but that her main contention is that the loans made by respondent First National Bank of Carrollton and respondent Williams are illegal because under the statute the only way for a guardian to borrow money is to mortgage the available real estate belonging to the ward. Chapter 458, R. S. Mo. 1949, V.A.M.S., does authorize a guardian to mortgage his ward's real estate under certain conditions. However, there is nothing in this chapter that prohibits a guardian from borrowing money needed for the ward's support and maintenance without giving a mortgage on the ward's real estate."

In *re Thomson's Estate*³ rules that a probate court could not say as a matter of law, without hearing evidence, that twelve years' delay in seeking a refund of partial distributions theretofore made out of an estate was unreasonable delay which would bar such a refund under the terms of Section 465.400.⁴ The more important question of general application is the ruling that laches would bar such right to a refund and that such defense might be passed on by the probate court. The opinion first discusses critically the dogma that laches cannot be asserted as a defense in an action at law, and then continues:

"We have, perhaps unnecessarily, expressed these views with reference to the soundness of the rule that laches may not be interposed as an equitable defense to a legal action to suggest that no apparent illogical or disastrous results would flow from an opposite rule. Because of the fact, however, that the rule is so well settled in this state, as shown by the cases heretofore cited and legion other cases to the same effect, we confine our ruling to the specific limited proposition here involved.

2. 253 S.W. 2d 111, 113 (Mo. 1952).

3. 362 Mo. 1043, 1053, 246 S.W. 2d 791, 797 (1952).

4. References to statutes are to Mo. REV. STAT. (1949), unless otherwise

"When an executor or administrator files an application for refund under the provisions of Sec. 465.400, he is proceeding under one of the provisions of our probate code providing a method by which assets may be caused to be returned to an estate for the purpose of paying debts. The provisions for the application are purely statutory. It is unnecessary and meaningless to classify an application under this statute as being a legal proceeding or as being an equitable proceeding. It is an application under a statute which has been enacted to supersede certain machinery of the common law, viz., the doctrine of marshalling assets in equity for the payment of debts. *Titterington v. Hooker*, 58 Mo. 593, 597, 598.

"The probate court has been given jurisdiction of the specialized function of supervising the administration of estates. We have often held that in determining matters within its jurisdiction a probate court may apply equitable principles. In *re Jamison's Estate*, Mo. Sup., 202 S.W. 2d 879, 883. And in probate proceedings one may avail himself of an equitable defense so long as it is asserted purely defensively and does not involve the granting of affirmative equitable relief. *Wilcox v. Powers*, 6 Mo. 145; *Evans v. York*, Mo. App., 216 S.W. 2d 124, 127. We perceive no reason why, if the probate court in a proceeding under Sec. 465.400 may apply the defense of equitable estoppel (recognized in this state as an available equitable defense to an action at law), it may not also apply the equitable defense of laches.

"We hold therefore that at a hearing on an administrator's application for refund under the provisions of Sec. 465.400 the probate court and the circuit court on appeal may consider and apply any legal or equitable defense which may be asserted to defeat the right of the administrator, including laches of the administration."

*Muench v. South Side National Bank*⁵ involved a claim by a grand-niece for value of her services rendered over a period of approximately seventeen years to the deceased, based on the failure of the deceased to perform his promise to compensate her for her services by leaving his property to her. It was held that the relationship of grand-niece was not such a family relationship as would give rise to a presumption that the services were intended to be gratuitous.

*Bemington v. McClintock*⁶ was a suit for specific performance between plaintiff's mother and stepfather to dispose of their property by a joint or mutual will whereby the property was to be devised to plaintiff upon the death of the survivor thereof. The court holds that on the evidence plaintiff

5. 251 S.W. 2d 1 (Mo. 1952).

6. 253 S.W. 2d 132 (Mo. 1952).

was entitled to recover and that the evidence met the high standard of proof required in such cases.

In *In re Franz' Estate*⁷ the court reaffirms its familiar rule that a demand filed in a probate court is not to be judged by the strict rules of pleading applicable to a petition in the circuit court.⁸ The court distinguished the earlier case of *Howard's Estate v. Howe*⁹ (wherein a contingent claim was held not to be provable in the probate court), saying:

"In the case of *Howard's Estate v. Howe*, supra, 344 Mo. 1245, 131 S.W. 2d 517, 519, it is said: 'A contingent claim is one where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there will ever be a liability. The contingency does not relate to the amount which may be recovered, but to the uncertainty whether any amount will ever be recovered. A claim not absolute or certain is not enforceable in the probate court against an estate.' The definition does not apply here, where a claim for absolute liability is stated, and where there is only a statement that petitioners have another remedy from which collection may or may not be made. In the *Howard* case the demand was expressly based upon an interlocutory decree of another court which was not final and might never become so. 131 S.W. 2d 517, 519. It was uncertain whether liability would ever be absolute or ever be established. It was held, 'There being no absolute liability now existing on the part of the company, it follows that there can be none on the part of the committee or of the estate.' 131 S.W. 2d 517, 519. This and the other cases relied on have no application under the facts here.

"The demand stated a valid claim already accrued against the estate of the deceased. It purported to be a matured claim, due and payable, on which liability was absolute. The claim covered services rendered between March 5, 1924 and April 14, 1930. It was verified by affidavit on May 1, 1931, the date it was 'exhibited and presented' to the executor of the estate. There was nothing conditional or contingent about the estate's liability for the entire claim, only the extent of offsets and credits to which the estate might be entitled by reason of sums which might be ordered paid to claimants from another source was contingent and uncertain. The recital that claimants were pursuing on additional remedy against other property and persons did not make the claim contingent. While claimants were entitled to only one satisfaction they could pursue as many consistent remedies and as many obligors as

7. 245 S.W. 2d 1, 7 (Mo. 1952).

8. *In re Thomosson's Estate*, 346 Mo. 911, 144 S.W. 2d 79 (1940).

9. 344 Mo. 1245, 131 S.W. 2d 517 (1939).

were available to them. *Mann v. Bank of Greenfield*, 323 Mo. 1000, 20 S.W. 2d 502, 508; *Kansas City v. Forsee*, 168 Mo. App. 213, 153 S.W. 572."

*Thompson v. St. Louis Union Trust Company*¹⁰ was a suit for specific performance of an antenuptial oral contract between plaintiff and her deceased husband wherein he agreed to leave all of his property to her if she would marry him and give up her employment of twenty-seven years, thereby losing pension rights to which she would be entitled if she worked for three more years. It was held that the making of the promise was proved in accordance with the high standard of proof required in such cases and that marriage was a sufficient consideration for such an agreement.

*Valentine v. St. Louis Union Trust Company*¹¹ was a replevin action brought to recover property taken possession of by co-executors who had found the same in the safe-deposit box of the deceased. As to certain Government Series G Bonds, the court follows the Treasury Regulations with respect to co-ownership creating a joint tenancy with right of survivorship. As to certain of the shares of stock which were in the name of the claimant, the court rules, in accordance with long established authority, that the certificates of stock were muniments of title and sufficient evidence of the ownership thereof. As to the currency and bearer bonds, it was ruled that the plaintiff had made a sufficient case by proof of declarations of the deceased and the fact that they were contained in sealed envelopes in the safe-deposit box marked "property of Gertrude Valentine."

II. CONSTRUCTION OF WILLS AND TRUSTS

As is, of course, usual, each case on construction of a will or trust depends upon the facts in the particular instance and, in general, the language used in a particular case is not of the greatest significance.¹² There were, however, two cases involving situations which arise with considerable frequency. The first of these is the case of *First National Bank of Kansas City v. University of Kansas City*,¹³ which deals with the problem arising where a will has been supplemented by a subsequently executed codicil. With reference to the construction of such a codicil, the court rules that for all practical purposes it is to be construed merely as though it were a subsequent

10. 253 S.W. 2d 116 (Mo. 1952).

11. 250 S.W. 2d 167 (Mo. 1952).

12. See for example *Taylor v. Hughes*, 251 S.W. 2d 94 (Mo. 1952).

13. 245 S.W. 2d 124 (Mo. 1952).

clause of the will; that it is not a new will; and that it does not change the meaning of clear, plain and unequivocal.

In *Gent v. Thomas*,¹⁴ the supreme court reiterated its earlier ruling¹⁵ that where property is left to one person for life, with a provision that "at her death whatever shall remain thereof" shall pass to another person, then the life tenant does not have an absolute power of disposition but, on the contrary, may only encroach upon and consume the corpus for her personal care and support, if such encroachment becomes necessary for such purpose.

The case of *Mickelberry Products Co. v. Haeussermann*¹⁶ illustrates the difficulties which may arise where insurance trusts have been set up to finance the purchase of stock in a closely held corporation and the corporation's stock is then sold to a third party, without the negotiations clearly determining the relative rights of the old and new stockholders.

III. WILL CONTESTS

*Davis v. Davis*¹⁷ involved a case where testatrix's sole surviving heir-at-law was granted leave to become a party to a will contest suit and to attack therein by cross-petition the will being contested and also a prior will. The heir died while the suit was pending. The supreme court held that the right to contest the will was personal and died with her. Admittedly, this had been the construction of the prior statute.¹⁸ With reference to the present statute the court said:

"But appellant's counsel also say the abatement statute, Section 507.100, subd. 1 (1), R. S. Mo. 1949, V.A.M.S.; Laws Mo. 1943, p. 364, sec. 22(a) (1), in force when Henry Davis was appointed administrator of Mrs. Young's estate, is different from sec. 1042, R. S. 1939, Mo. R.S.A., in force when the Braeuel and Campbell cases were decided. The former now reads (emphasis appellant's): 'If a party dies *and the claim is not thereby extinguished*, the court shall on motion order substitution of the proper parties. * * *' The latter previously provided: 'No action shall abate by the death, marriage or other disability of party, *if the cause of action survives or continue.*' [Emphasis the court's.]

"Appellant's counsel assert: 'The language of the two statutes is clearly distinguishable. The old statute referred specifically to

14. 252 S.W. 2d 345 (Mo. 1952).

15. Palmisciano v. Staltari, 175 S.W. 2d 793 (Mo. 1943).

16. 247 S.W. 2d 731 (Mo. 1952).

17. 252 S.W. 2d 521, 523 (Mo. 1952).

18. Braeuel v. Reutter, 270 Mo. 603, 193, S.W. 283 (1917); Campbell v.

the survival of the "cause of action," whereas the new statute states that if "the claim is not extinguished" the Court shall order a substitution of the proper parties.' On that point appellant cites *Wormington v. City of Monett*, 356 Mo. 875, 880, 204 S.W. 2d 264, 266 (1). But there was no such question in the *Wormington* case, and the cause of action there did survive. We can see no substantial difference between the two statutes. The substitution of the word 'claim' in the new for the words 'cause of action' in the old makes no difference, at least under the facts here. The present statute was discussed in the monograph written by Judges Hyde and Douglas of this court and published in 2 Carr, Missouri Civil Procedure, p. 539. It pointed out that there was no practical difference in the word 'claim' and the 'controversial' words 'cause of action' appearing in the former statute, and that the latter expression was 'shunned throughout' the new code."

*Wright v. Stevens*¹⁹ was a will contest on the grounds of mental incapacity and undue influence. The court reiterated the familiar rule that a lay witness is not competent to testify that a person is of unsound mind without first reciting the facts upon which such an opinion is based. The court held here that it was not enough to show that the testator could not carry on a coherent conversation "very well," was drowsy, nervous, shaky and sick, and that "he would be talking about one thing and then he would go off onto another thing." It was likewise held not to be sufficient evidence of undue influence that the testator's brother, at the testator's request, caused a certain lawyer to come to see the testator (without the brother), the lawyer drew the will and subsequent to the testator's death the lawyer was paid by the brother who was executor of the will, it not appearing whether payment was out of the brother's funds or the estate.

In *Snell v. Seek*²⁰ a will contest was brought on the ground that the defendant, who had been the second husband of testatrix, had unduly influenced the making of the will by testatrix, who was contestant's foster mother by her first marriage. The court held that it was not sufficient to show that he handled matters of business for her concerning a joint bank account and farm. The court then continued:

"But even if we assume the existence of a 'fiduciary relationship,' were there other facts and circumstances in evidence from which it could be reasonably inferred that the will in question was in fact the result of undue influence on the part of defendant Seek?

19. 246 S.W. 2d 817 (Mo. 1952).

20. 250 S.W. 2d 316, 344 (Mo. 1952).

We again consider the physical and mental condition of testatrix, the fact of the husband-wife relationship, and all circumstances shown in evidence from which any fair inference of undue influence may be made. Seek took handwritten notes to an attorney, arranged for the presence of witnesses, and was present himself at the time his wife executed the will. But the evidence shows that Mrs. Seek was unable to journey to the lawyer's office; that she requested her husband to take these notes to the lawyer and ask that the will be drawn. Contestants adduced no evidence that the notes were in the handwriting of defendant Seek. The only evidence in the record is the testimony of defendant Seek that they were in the writing of testatrix. There was evidence that Mrs. Seek, up to the time of her death, wrote frequent letters to her children; that she had a will prior to the one in question, and it is a fair inference that she was familiar with and had available a copy of the will of her former husband, John Summers. In view of this evidence, it would be unreasonable to infer that the notes were in the handwriting of Seek.

"As heretofore noted, the evidence does not indicate that testatrix was in such condition as to be especially susceptible to influence. True, testatrix had been ill. No medical evidence was offered by contestants as to the nature of the illness or of any effect its particular nature might have upon her mental faculties. Proponent's evidence does not aid contestants but, to the contrary, indicated physical disabilities unconnected with mental conditions. No physical disability was shown from which a natural inference would arise that testatrix was so weakened as to be totally reliant upon others. Testatrix was elderly, comparatively old, but there was no substantial evidence to indicate that she was not capable of disposing of her property in accord with her own desires based upon the exercise by her of an independent judgment and free agency. *Larkin v. Larkin*, supra, 119 S.W. 2d 357 (5-7), 358 (13); *Hahn v. Brueseke*, supra, 155 S.W. 2d 106 (7)."

*Wipfler v. Basler*²¹ was a will contest based on the contention that the testator was of unsound mind. The will was upheld in the court below and this was affirmed on appeal. A number of questions were determined with reference to evidentiary matters, but, aside from these, the case follows the general trend of will contest cases based on alleged mental incapacity.

*Brownfield v. Brownfield*²² was a will contest suit in which the seriously litigated issue was whether or not the will offered for probate had been re-

21. 250 S.W. 2d 982 (Mo. 1952).

22. 249 S.W. 2d 389 (Mo. 1952).
Published by the University of Missouri School of Law, 1953

voked by a subsequent will. There was no proof that the alleged subsequent will had been signed by two witnesses. It was held that such a purported instrument could not act as an instrument of revocation.

IV. CONSTRUCTIVE AND RESULTING TRUSTS

During the year 1952 the court decided a number of cases involving constructive and resulting trusts, largely involving cases wherein there was a family or other fiduciary relationship. The cases necessarily depend upon their particular facts but are of general interest in that they illustrate the tendency of the Supreme Court of Missouri to use the doctrine of constructive and resulting trusts as a means of striking down conduct which involves an element of breach of confidence or, in the alternative, an element of obvious unjust enrichment.

*Basman v. Frank*²³ was a suit to set aside deeds to real property which plaintiff had allegedly conveyed to defendant without consideration and which defendant had in turn conveyed to his co-defendant who was not a purchaser for value. The court held that there was a constructive trust, saying:

"Certainly there was a confidential relation here between Frank and plaintiff. Frank not only provided a home for plaintiff apparently making him feel that he would be treated and cared for like a member of the family, but also took charge of all of his money, giving him only small amounts therefrom from time to time for spending money. There was never any accounting for the money and apparently plaintiff had such confidence in Frank that he never asked for one while he was living there. Plaintiff went from the hospital to Frank's home after a serious operation and was in the hospital again on three separate occasions (two of them for more than a month) during the next year before the deed was made. Obviously, plaintiff was not able to look after his rental property himself. Plaintiff trusted Frank and executed the deed to him (just as he had turned over his money to him) prepared by Frank's own lawyer without seeking any independent advice from anyone. This left plaintiff completely dependent upon Frank for the custody, control and management of everything he owned. Frank had plaintiff's money in his own bank accounts and plaintiff's real estate in his own name on the deed records. Defendants contend that the mere opportunity to unduly influence, unsupported by other evidence showing its actual existence, does not raise a presumption of undue influence even though a confidential relation-

ship is shown, citing *Lastofka v. Lastofka*, 339 Mo. 770, 99 S.W. 2d 46 and *Hahn v. Brueseke*, 348 Mo. 708, 155 S.W. 2d 98. However, those were cases in which the transaction sought to be set aside was intended to be a gift. There is no such claim here. The issue here is not undue influence but whether there was a valid sale to defendants, or whether there was a transfer intended for the transferor's own benefit, induced by fraud, misrepresentation or because of a confidential relationship, requiring the finding of a constructive trust."

In *Schroer v. Schroer*,²⁴ the court said:

"The dissolution of a partnership may be granted by a court of equity in favor of an innocent partner who has been excluded by his copartner from participation in the conduct of the business, or where such copartner has refused an accounting, repeatedly breached the partnership agreement, appropriated partnership property to his own use, but guilty of other fraud in the partnership affairs, or committed other gross misconduct. *Schneider v. Schneider*, 347 Mo. 102, 146 S.W. 2d 584; *Beller v. Murphy*, 139 Mo. App. 663, 123 S.W. 1029; Annotation, 118 A.L.R. 1422; 40 Am. Jur., Partnership, §§ 245, 246, pp. 300, 301. (See section 358.320 R. S. Mo. 1949, V.A.M.S., for the stated grounds for dissolution by decree of court under the presently effective 'Uniform Partnership Law,' enacted by the 65th General Assembly, L. 1949, §§ 1-44, pp. 506-521.) The relationship inter sese of partners is a fiduciary one. Where certain of the partners wrongfully exclude another from its business and take unto themselves the assets of the partnership they become, as to the excluded partner, trustees ex maleficio, *Schneider v. Schneider*, supra; *Filburn v. Ivers*, 92 Mo. 388, 4 S.W. 674 and are to be held accountable to the excluded partner for his share of the subsequently earned profits. *Schneider v. Schneider*, supra."

In *Cross v. Cross*²⁵ the evidence showed that the deceased trustee had wrongfully commingled a trust fund with his individual funds and with such commingled funds had purchased property in the name of himself and his wife as tenants by the entirety. It was shown in the particular case that the wife knew during her husband's lifetime of the fact that he had commingled the trust fund with his own. The court held that she took the property subject to an equitable lien on it for the amount of the trust fund and that she was personally liable for such trust fund so commingled.

24. 248 S.W. 2d 617, 619 (Mo. 1952).

25. 366 S.W. 2d 1098, 246 S.W. 2d 801 (1952).
Published by University of Missouri, 246 S.W. 2d 801 (1952) Repository, 1953

*Darrow v. Darrow*²⁶ involved litigation between a former husband and wife with reference to ownership of property acquired by them as tenants by the entirety prior to the divorce, which property had been acquired largely out of proceeds of the settlement of a law suit brought by the husband and wife for injuries to the wife and damages to the husband arising therefrom. The wife claimed a resulting trust in the money. The court held that the evidence was not sufficient to show such a resulting trust, saying:

"We understand defendant does not question the contentions made by plaintiff: that moneys received by the wife for any violation of her personal rights are her separate property, R. S. 1949, sec. 451.250, V.A.M.S.; 41 C.J.S., Husband and Wife, p. 744, sec. 262; that the record does not establish a written assent contemplated by sec. 451.250 of plaintiff to reduce plaintiff's separate property to his possession, *Herzog v. Ross*, 358 Mo. 177, 213 S.W. 2d 921, loc. cit. 929, 930; *Messenbaugh v. Goll*, 198 Mo. App. 698, 202 S.W. 265(4); that presumptions arising from deposits in joint bank accounts with the right of survivorship may be rebutted, *Clevidence v. Mercantile Home Bk. & Trust Co.*, 355 Mo. 904, 199 S.W. 2d 1, 6(5); *Thieman v. Thieman*, Mo. Sup., 218 S.W. 2d 580, 583(4, 5); and that a resulting trust arises in favor of the wife where the husband has reduced her separate property to his possession without her written assent, *Sanders v. Sanders*, 357 Mo. 881, 211 S.W. 2d 468, 470 (1, 3) and cases cited; *Moss v. Ardrey*, 260 Mo. 595, 611, 169 S.W. 6, 10; *Thieman v. Thieman*, supra.

"The record indicates that plaintiff is an intelligent woman. Her testimony shows that she and defendant established a joint bank account, with right of survivorship, in 1944; that they took title to several pieces of real estate and their automobiles as estates by the entirety; that she participated in the negotiations leading up to the purchase of the property involved and executed the notes and deeds of trust with defendant to secure the unpaid purchase price and did not question the deed conveying the property as an estate by the entirety. Plaintiff testified she was not able to do typing after her injury. Quite a number of deposits were made in their Munsey Trust Company joint account while plaintiff was hospitalized, some being for several hundred dollars and several in excess of \$1,000, and payments were made therefrom for expenses incurred on account of plaintiff's injuries prior to the settlement of the litigation. The joint bank account refutes plaintiff's contention (whether otherwise legally sound or not) that only her separate funds were used in the purchase of the property involved. For instance: On the date of the contract of purchase, May 27, 1948,

the balance in their joint account exceeded \$24,000. The \$11,500 unpaid purchase money was borrowed and loaned on the credit of plaintiff and defendant. Plaintiff was a *femme sole* with power 'to carry on and transact business on her own account, to contract and be contracted with' et cetera with respect to her separate property and to do with it as she pleased. R. S. 1949, sec. 451.290, V.A.M.S. The rights of plaintiff and defendant in their joint bank deposits in this state, with the right of survivorship, as evidenced by the signature card executed by plaintiff and defendant covering their joint deposit in the Commerce Trust Company conforms to the statutory recognized rights of such depositors. See R. S. 1949, sec. 362.470, V.A.M.S.; *Murphy v. Wolfe*, 329 Mo. 545, 45 S.W. 2d 1079. Cash payments at the time of purchase were made out of said joint deposits.

"This is not a case, as are the plaintiff's cases, of a husband taking funds entrusted to him by his wife to purchase property in her name and his taking title in his name or by the entirety, of a case involving merely the blank endorsement by the wife of a check or note due her and delivery of the instrument to the husband as was the situation in *Messenbauch v. Goll*, 198 Mo. App. 698 202 S.W. 265 S.W. 265 (4), and cases there cited."

In *Lehr v. Moll*²⁷ proceedings were brought to set aside a deed of trust in the amount of \$9000. Admittedly no consideration had been given for the deed of trust but it was urged that a resulting trust for the benefit of the husband was created when he took title in the name of himself and his wife. The court denied this saying:

"We agree with appellants that the law in this state is that where a husband purchases real estate with his own funds and the grantees in the deed are the husband and wife, then they become tenants by the entireties, and it will be presumed that the husband intended the conveyance as a provision for his wife and a resulting trust will not arise. However, the presumption that the purchase was an intended settlement upon his wife is rebuttable. *Bender v. Bender*, 281 Mo. 473, 220 S.W. 929; *State ex rel. Roll v. Ellison*, 290 Mo. 28, 233 S.W. 1065; *Thierry v. Thierry*, 298 Mo. 25, 249 S.W. 946; *Fulbright v. Phoenix Ins. Co.*, 329 Mo. 207, 44 S.W. 2d 115; *Hiatt v. Hiatt*, Mo. Sup., 168 S.W. 2d 1087.

"Since the presumption that the purchase was an intended settlement on his wife is rebuttable, it becomes necessary to inquire under what circumstances the presumption may be rebutted.

"A resulting trust must arise, if at all, at the instant the deed is taken. Unless the transaction is such that the moment the title

passes the trust results from the transaction itself, then no trust results. It cannot be created by subsequent occurrences. 1 Perry on Trusts, § 133; *Barrett v. Foote*, Mo. Sup., 187 S.W. (67) loc. cit. 69; *Stevenson v. Haynes*, 220 Mo. (199) loc. cit. 206, 119 S.W. 346; *Kelly v. Johnson*, 28 Mo. loc. cit. 249; *Richardson v. Champion*, 143 Mo. (538) loc. cit. 544, 45 S.W. 280.' *Bender v. Bender*, supra, 220 S.W. loc. cit. 930.

"The facts in the case at bar show that the deed had been delivered and the seller had been paid and, in fact, had left Osterkamp's office before the deceased even mentioned the mortgage; therefore, the facts relied upon by appellants to create a resulting trust had not taken place 'at the instant the deed was taken.' It was subsequent events that appellants rely upon to create the resulting trust. Moreover, under the terms of the trust agreement signed by Moll and deceased, these notes were not to be delivered until after Lehr's death, which did not happen until about three years later.

"The facts in this case come within the rule announced in the case of *Fulbright v. Phoenix Insurance Co.*, supra, 44 S.W. 2d loc. cit. 118, wherein we said: 'But in all the cases that have been called to our attention in which a resulting trust was declared in favor of the husband who had furnished the purchase money it was shown that he did not intend to vest any title or interest in the wife. No case has been cited nor have we found any in which such trust was held to arise where, as here, the husband furnished the purchase money and purposely caused the deed to be made to his wife or to himself and wife, intending thereby to convey an estate to her, but seeking to limit that estate and the scope and effect of the deed, contrary to its terms, by his mere intention that the deed should not have the full effect the law affixes to it.'

"So at the time the deed from Mrs. Gross was delivered to deceased there were no facts from which a resulting trust could be established."

*James v. James*²⁸ is another case involving an alleged resulting trust arising out of transactions between husband and wife. The fact situation under which the property was conveyed by the wife to the husband is stated as follows:

"When plaintiff and defendant were married, defendant had no regular job. Within a few months, defendant asked plaintiff 'to sign the property over to him so he could sign bigger bonds. He wanted to make some money, because he had no regular job. * * * He said you can always get it back.' The purpose of deeding the

property to defendant was 'To sign bonds * * * so he could sign bonds.' She transferred the property to defendant on May 9, 1938." The court rules that there was a resulting trust in favor of his wife.

"A resulting trust, as distinguished from an express trust, is one implied by law from the acts and conduct of the parties and the facts and circumstances which at the time exist and attend the transaction out of which it arises.' *Little v. Mettee*, 338 Mo. 1223, 93 S.W. 2d 1000, 1009(8, 9). The applicable law with reference to resulting trusts is well reviewed in *Jankowski v. Delfert*, 356 Mo. 184, 201 S.W. 2d 331, 334, and need not be further reviewed here.

"In this case the facts and circumstances show no consideration for the transfer of title from plaintiff to defendant and that no gift of the property was intended at the time of the transfer to defendant. A trust resulted in favor of plaintiff. *Clark v. Clark*, 322 Mo. 1219, 18 S.W. 2d 77, 81; *Mays v. Jackson*, supra; *Jankowski v. Delfert*, supra."

V. CASES INVOLVING ATTORNEYS' FEES

*In re Shields Estate*²⁹ involved a situation wherein the Probate Court of the City of St. Louis ruled that an attorney, who had admittedly acted as attorney for the executor and had satisfactorily performed his duties as such attorney, was not entitled to receive a reasonable fee for his services, because paying him such a fee would violate the principle of undivided loyalty to the client laid down in Rule 4.06 of the Canon of Ethics of the Missouri Supreme Court, where the attorney had (1) at the widow's request prepared an application for a year's support, and (2) was named as co-trustee of the residuary estate although he was not a co-executor of the probate estate. The Missouri Supreme Court squarely upheld the conduct of the attorney and ruled that he was not disqualified from acting as attorney for the estate by such possible conflicting interest where there was no evidence of any actual conflicting interest, saying:

"We have found no case dealing with the right of an attorney who has been named as a testamentary trustee to act as an attorney for the estate in the administration thereof. But it would seem clear, by analogy, that if an executor may lawfully act in the dual capacity as a testamentary trustee, and all the authorities we have found hold he may, then it follows that an attorney for an executor, whose duties are but to advise the executor as to his legal rights and whose services are honestly and efficiently performed, may also so act to the same extent.

"The law is well settled that the office of executor and testamentary trustee are separate and do not merge though they may be conferred upon and exercised by the same person. In *re* Shelton's Estate, 338 Mo. 1000, 93 S.W. 2d 684; *Williams v. Hund*, 302 Mo. 451, 258 S.W. 703; 21 Am. Jr. § 217, p. 493. 'Where it becomes important to ascertain whether a person occupying the dual status of executor and trustee was acting in the one or the other capacity, it is ordinarily held that an executor does not change his status to that of a trustee until there has been a legal ascertainment and separation of the trust fund from the general funds of the estate, or until the administration has been completed, or distribution made.' *State ex rel. Richards v. Fidelity and Casualty Company of New York*, Mo. App., 82 S.W. 2d 123, 127. See also: *West v. Bailey*, 196 Mo. 517, 94 S.W. 273; *In re Holmes' Estate*, 328 Mo. 143, 40 S.W. 2d 616, 618; *Selleck v. Hawley*, 331 Mo. 1038, 56 S.W. 2d 387, 397.

"At the time Baron performed the services herein complained of, there had been no ascertainment or separation of the trust fund from the general fund. There had been no violation of Rule 4.06.

"The cases cited by appellant, *In re Buder*, 358 Mo. 796, 217 S.W. 2d 563, 574; *In re Parker's Estate*, 200 Cal. 132, 251 P. 907, 49 A.L.R. 1025; and *Moffett Bros. Partnership Estate v. Moffett*, 345 Mo. 741, 137 S.W. 2d 507, are readily distinguishable on the facts.

"The fact that in accepting employment as attorney for the estate and in the performance of such services a conflict *might* have arisen, or *might* yet arise on final settlement, with Baron's duties as trustee is beside the point. Attorneys would be circumscribed beyond the bounds of reason if they could not represent clients whose interest *might* at some future time conflict with the interests of other clients. It is only when the situation arises that it becomes the duty of the attorney either to withdraw from the service of any or both clients or to make full disclosure to both clients and obtain their joint consent to his continuing to serve one or both of them, as the circumstances may require."

*Tracy v. Martin*³⁰ was a proceeding in which the guardian *ad litem* for a minor defendant in a suit brought to set aside a trust indenture as having been executed due to undue influence and while the grantor was incompetent, sought the allowance of a fee for his services in unsuccessfully defending the validity of the trust indenture. The trust indenture itself had been held invalid.³¹ Evidence in this proceeding showed that the guardian *ad litem*

30. 249 S.W. 2d 321 (Mo. 1952).

31. See *Tracy v. Sluggert*, 360 Mo. 1120, 232 S.W. 2d 926 (1950).

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had no other source of obtaining his fee since the minor was insolvent. It was held that under these circumstances a fee could be allowed to the guardian *ad litem* and taxed as cost against the prevailing parties.

*In re Ballard's Estate*³² was a proceeding in which a lawyer named as executor in a will sought reimbursement for expenses and attorney's fees incurred by him in attempting to have probated an executed carbon copy of the will, the original not being available. The attempt at having it probated was unsuccessful.³³ The court holds that the real parties in interest in a will contest are the devisees claiming under the will and the heirs. The court follows *In re Soulard's Estate*³⁴ in ruling that where a will has been rejected in the probate court the executor is not required to contest this rejection and hence is not entitled to an allowance of such attorney's fees.

32. 247 S.W. 2d 683 (Mo. 1952).

33. *Menzi v. White*, 360 Mo. 319, 228 S.W. 2d 700 (1950).

34. 141 Mo. 642, 43 S.W. 617 (1897).

THE NEW GENERAL CODE FOR CIVIL PROCEDURE AND SUPREME COURT RULES INTERPRETED

CARL C. WHEATON*

OBJECTIVES OF CODE

The primary purpose of the code is to do justice.¹

PARTIES

a. *Real Party in Interest*

The party prosecuting an action must be the real party in interest, and this requirement is as fully applicable to a declaratory judgment action as to any other.²

b. *Joinder of Tort-feasors*

A plaintiff need not sue all joint tort-feasors, but he may sue as many of them as he may think proper, for some may be sued without affecting the others.³

c. *Ordering Parties Joined or Dropped*

Section 507.030, subdivision 2, of the *Missouri Revised Statutes*, 1949, which provides that when a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in by an amendment of the petition, or by a supplemental petition and a new summons, and Section 507.050, subdivision 1, of those statutes, which states that parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just, should be construed so that each will be given some meaning. The only way that this may be accomplished is to hold that Section 507.030, subdivision 2, was intended to apply to the addition of necessary or indispensable parties and that Section 507.050, subdivision 1, provided the procedure for adding proper parties.⁴

Though a motion to add a party under Section 507.050 should properly be in writing, where the trial court upon oral motion permitted the addition

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1. *Leslie v. Mathewson*, 257 S.W. 2d 394 (Mo. App. 1953).

2. *Contracting Plumbers Association of St. Louis v. City of St. Louis*, 249 S.W. 2d 502 (Mo. App. 1952).

3. *Miltenberger v. Center West Enterprises, Inc.*, 251 S.W. 2d 385 (Mo. App. 1952).

4. *Id.*, 251 S.W. 2d 385 (Mo. App. 1952).

<https://scholarship.law.missouri.edu/mlr/vol18/iss4/1>

of a party, there was not such an irregularity as would require a subsequent default judgment against the defendants to be set aside.⁵

d. *Permissive Joinder*

A single contract whereby theatre operators agreed to pay the plaintiff stated, weekly sums, which were different for each operator, for his delivery of films to them, was held not to create against the operators a liability permitting their joinder as defendants by him, since their liability was said not to have arisen out of the same transaction, occurrence, or series thereof and it was further held that no common question of fact or law common to all of the operators was involved. The action was for reformation of the contract to provide an option on the plaintiff's part to extend the contract for a second year and for damages.⁶

The writer doubts the correctness of this decision. Was there not a single contract transaction? Were there not the common facts of the existence of the contract and of the alleged improper drafting thereof?

e. *Interpleader*

An action of interpleader really involves two actions or litigations, one between the plaintiff and all the defendants as to whether they shall be required to interplead for the fund, and the other an action between the defendants, if the plaintiff's petition to require them to interplead is sustained. The objects of these two litigations are wholly separate and distinct, and therefore require separate and distinct allegations and proofs.

In a true interpleader, if it appears by pleading and proof that a bill of interpleader is properly filed, a decree should be made dismissing the plaintiff with costs, upon the depositing by him of the fund or thing in dispute into court, and ordering the defendants to interplead. When this decree is obtained, the plaintiff is altogether out of the suit, leaving the interpleading defendants alone to contest their conflicting claims. After the withdrawal of the plaintiff from the case, the controversy is then solely and exclusively carried on between the interpleaders claiming the fund.

For a true stakeholder, seeking only to be immediately relieved of liability, an attitude of perfect disinterestedness, excluding even an indirect interest on the part of the plaintiff is indispensable to the maintenance of the

5. *Ibid.*

6. *Tanner v. Garner*, 255 S.W. 2d 158 (Mo. App. 1953).

bill, and his position must be one of continuous impartiality, except for his wish that the thing in his possession shall be awarded to the right party.⁷

PLEADINGS

a. *Meaning of Claim for Relief*

There is no practical difference between the new "claim for relief" as used in the new Code of Civil Procedure and the old "cause of action."⁸

"Cause of action," when considered in a procedural sense with reference to pleadings, has been defined as the facts giving rise to the action; the fact or combination of facts which give rise to or entitle a party to sustain an action; the existence of those facts which give a right to judicial interference or relief in his behalf; the entire set or state of facts that give rise to an enforceable claim. A cause of action consists of those facts, as between at least two parties, entitling one of them to a judicial remedy of some sort against the other for the redress of a wrong. A cause of action is the *cause* for action, *i.e.*, the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.

A cause of action to contest a will consists of all of those facts available to a contestant which, if established, legally entitle the contestant to a judgment setting aside the will. The ultimate issue in all will contests is fixed by statute, *i.e.*, whether the paper writing produced be the will of the testator or not. The gist of the cause of action is the invalidity of the will.⁹

b. *Stating Claim for Relief*

1. Liberal Construction

In determining whether or not a petition states a claim or cause of action, the averments of the petition are to be given a liberal construction, according the averments their reasonable and fair intendment which should be indulged from the facts stated. So considered, a petition should be held sufficient if its averments invoke substantive principles of law which entitle the plaintiff to relief. A petition is not to be held insufficient merely because of a lack of definiteness or certainty in allegation or because of informality in the statement of an essential fact.¹⁰

7. *Heinrich v. South Side National Bank in St. Louis*, 250 S.W. 2d 345 (Mo. 1952).

8. *Supra* note 3.

9. *Miller v. Munzer*, 251 S.W. 2d 966 (Mo. App. 1952).

10. *Downey v. United Waterproofing, Inc.*, 253 S.W. 2d 976 (Mo. 1953), *Zuber v. Clarkson Construction Company*, 251 S.W. 2d 52 (Mo. 1952).

2. What Considered

In determining the cause of action intended to be pleaded under the new code, the facts pleaded and relief sought may be considered.¹¹

3. Affirmative Defenses not to be Pleased.

Contributory negligence is purely a defensive matter which the plaintiff is not required to negative in his petition.¹²

c. *Singleness of Cause*

A cause of action to contest a will is single no matter how many grounds of contest there may be. The various grounds constitute, in the aggregate, but one cause of action; they are incidents of the cause of action but are not causes of action in and of themselves. The grounds are merely the evidentiary supports of, or modes of proving, the cause of action, and, although they may vary (fraud, forgery, undue influence, improper execution, lack of testamentary capacity, revocation, etc.), the cause of action remains one and the same. Each such separate ground must be alleged, if evidence thereof is to be admitted at the trial, so that there may be many separate issues within the one all-embracing issue. While the evidence necessary to support the various grounds alleged may be quite different, these separate issues are but facets of the one cause of action, and do not constitute separate and independent causes of action.¹³

d. *Joinder of Causes*

With respect to the joinder of claims, or causes of action, Section 509.060 is permissive, and a plaintiff is not required to join his several causes of action, even though they arise out of the same transaction.¹⁴

One may not set forth inconsistent causes of action in a single count. Therefore, in a single count, he cannot seek relief on the grounds that a contract is fraudulent and void and that it is valid.¹⁵

e. *Affirmative Defenses*

The defenses of contributory negligence¹⁶ and of the statute of frauds¹⁷ are affirmative defenses and should be pleaded affirmatively.

11. *Kemp v. Woods*, 251 S.W. 2d 684 (Mo. 1952).

12. *Carter v. Skelly Oil Co.*, 252 S.W. 2d 306 (Mo. 1952).

13. *Miller v. Munzer*, *supra* note 9.

14. *Stoops v. Stoops*, 256 S.W. 2d 799 (Mo. 1953).

15. *Kemp v. Woods*, *supra* note 11.

16. *Spencer v. Kansas City Public Service Co.*, 250 S.W. 2d 187 (Mo. App. 1952).

17. *Kansas City Stock Yards Co. v. A. Reich & Sons*, 250 S.W. 2d 692 (Mo. 1952).

f. *Failure to Present Defenses*

A judgment for the plaintiff is proper where the defendant's answer admits every material averment in the petition and fails to set up any defense which, if established, would defeat the plaintiff's claim.¹⁸

g. *Counterclaims*1. *Compulsory*

Under the compulsory counterclaim statute, failure of a school teacher to interpose a counterclaim for salary in a suit by the school district to enjoin the school teacher from teaching or attempting to teach school for the year in question precluded the teacher from thereafter maintaining an action for salary for that year, for the two causes arose out of the same transaction.¹⁹

For the same reason, in an action of replevin by an owner who had allegedly agreed to pay the defendant one half of the value of calves born to the cows involved in said action in return for the defendants caring for them, any claim of the defendant for breach of the contract referred to above involved a compulsory counterclaim which the defendant would be required to file before judgment in the owner's action, or lose advantage of the claim.²⁰

2. *Permissive*

Supreme Court Rule 3.16, supplementing Section 509.069 of the *Revised Statutes*, provides that a counterclaim may be filed even though it does not arise out of the subject matter of the adverse party's claim. Consequently, a defendant may properly file as counterclaims any matured claims he has against plaintiffs at the time of the filing of the defendant's first required pleading.²¹

h. *Amendments to Pleadings*1. *Liberality*

Under both the spirit and the letter of our code, great liberality is to be indulged in the amendment of pleadings at any stage of a proceeding.²²

18. *Leggett v. General Indemnity Exchange*, 250 S.W. 2d 710 (Mo. 1952). Likewise it was held in *Ray v. Nethery*, 255 S.W. 2d 817 (Mo. 1953) that a failure to raise a claim of defect of parties by a proper pleading waived that defect, and, in *Leslie v. Mathewson*, 257 S.W. 2d 394 (Mo. App. 1953), there was a similar holding as to the defense of the plaintiff's lack of legal capacity to sue.

19. *Brinkmann v. Common School District No. 27 of Gasconade County*, 255 S.W. 2d 770 (Mo. 1953).

20. *Shepherd v. Wommack*, 257 S.W. 2d 172 (Mo. App. 1953).

21. *Richardson v. Kuhlmyer*, 250 S.W. 2d 355 (Mo. 1952).

22. *Hughes v. St. Louis Public Service Co.*, 251 S.W. 2d 360 (Mo. App. 1952).

2. Issues not Pleaded

A petition, although alleging fraud in the procurement of both a note and a deed of trust, asked only for cancellation of the deed of trust. This was clearly an oversight. The record showed that both parties tried the case on the theory that cancellation of both was sought. The decree expressly cancelled both, and the appellant did not question it on that ground. Hence, the petition was considered as amended to include a prayer for cancellation of the note, since the issue of the validity of the note was tried with the consent of the parties.²³

3. Departure

It has been held that, under the new code, the rule of departure has been entirely abolished and that there is now no limitation on the scope of an amendment to a petition.²⁴

4. Statutes of Limitation

In a case in which the respondent claimed that it was fatal to the plaintiff's case that he waited until after the expiration of the one-year limitation period before amending his petition to allege his interest in the probate of a will, and to change the basis of his objection to the will from undue influence to revocation of the will, the court disagreed with him. It held that the failure of the original petition to allege the plaintiff's interest did not render it a nullity. It was merely an imperfect and incomplete statement of a cause of action. The amendment after the expiration of the statutory period was proper, in so far as its timeliness was concerned.

It stated further that, considering the peculiar nature of a will contest, the amended petition introduced no new cause of action.

The court reasoned that, though inevitably a new ground of contest calls for different evidence, a new ground of contest is not a new cause of action, for the reason that there is but one cause of action in a will contest, no matter how many grounds of impeachment exist.

The court stated that the amendment adding a new ground for recovery was merely an attempt to support the cause of action already alleged upon a new ground.²⁵

23. *Howell v. Reynolds*, 249 S.W. 2d 381 (Mo. 1952).

24. *O'Neal v. Mavrakos Candy Co.*, 255 S.W. 2d 138 (Mo. App. 1952).

25. *Miller v. Missouri*, 251 S.W. 2d 956 (Mo. App. 1953).

MOTIONS TO MAKE MORE DEFINITE

In a recent case involving damage by fire, the appellant complained that the trial court erred in "sustaining defendant's motion to make plaintiff's original and first amended petitions more definite and certain" as to the allegations of negligence, thereby refusing to allow the plaintiff to proceed under the theory of *res ipsa loquitur*.

The supreme court held that a motion to make a petition more definite and certain is addressed to the sound discretion of the trial court, whose ruling thereon will not be disturbed provided a sound legal discretion was exercised. It further stated that the rule of *res ipsa loquitur* is infrequently applied to cases involving fires, since the cause of a fire is generally unknown and fires commonly occur where due care has been exercised as well as where due care was wanting. Where a fire originates on a defendants' premises, that alone is not evidence that it was started by the defendant, nor that the fire was caused by any negligence on its part. Hence, the supreme court decided that the trial court had exercised a sound legal discretion in this instance.²⁶

MOTIONS FOR JUDGMENT ON THE PLEADINGS

On June 21, 1951, the plaintiff filed his "First Amended Petition." On July 2, 1951, the defendant filed a motion "To Strike Out All of Count III of Plaintiff's Amended Petition." This motion was sustained on August 28, 1951. On September 4, 1951, the defendant filed his "First Amended Answer to Plaintiff's First Amended Petition." The cause came on regularly for trial on October 10, 1951, and the plaintiff, after the jury had been selected for trial, orally moved for judgment on the pleadings, offering to make proof of his damages, on the ground that the defendant was in default as to said counts, the only counts remaining for trial. The appellate court held that the trial court properly overruled the motion, since the plaintiff's motion was not timely.²⁷

It has been decided that motions for judgment on pleadings admit only facts well pleaded by opposing parties.²⁸ This probably refers to relevant facts.

The supreme court has held that where an answer, after admitting the

26. Kansas City Stock Yards Co. v. A. Reich & Sons, 250 S.W. 2d 692 (Mo. 1952).

27. Parks v. Thompson, 253 S.W. 2d 796 (Mo. 1952).

28. Leggett v. General Indemnity Exchange, *supra* note 18.

factual allegations of a petition, sets up an affirmative defense to the plaintiff's claim, the plaintiff's motion for judgment on the pleadings cannot be sustained if the answer's new matter constitutes a valid defense, and the defendant's like motion should be sustained only if that defense is sufficient in law.²⁹ The suggestion is that, if the defendant's defense is valid in the second instance, he will win on his motion, but what if the plaintiff's is also valid?

PRODUCTION OF DOCUMENTS

Section 510.030 of the *Revised Statutes* does not authorize an order for the production of any of the documents or things mentioned in said section, unless they "constitute or contain evidence material" to some matter involved in the action.³⁰

It is equally true that good cause must be shown for the production of relevant and material documents; and that privileged documents may not be ordered to be produced.³¹

The applicant for such an order has the burden of satisfying the trial judge as to their relevancy and materiality, and of showing that they were not privileged and that there was good cause for their production, since he is the moving party.³²

NOTICE

Where a stipulation of the parties as to the facts was filed, there was no occasion for notice to any party of the filing of a new petition setting forth transactions, occasions, or events which had happened since the date of the pleading sought to be supplemented, where they were covered by the stipulation.³³

Interpreted literally, the phrase "new or additional claims for relief" as used in Section 506.100 of the *Revised Statutes*, relating to the method of serving papers and to the need for serving them on parties in default, would cause that statute to be construed to mean that no pleadings subsequent to the original petition need be served on parties in default for failure to appear unless it contained a prayer for an additional amount of money or

29. *Ibid.*

30. *State ex rel. Terminal R.R. Ass'n. of St. Louis v. Flynn*, 257 S.W. 2d 69 (Mo. 1953).

31. *Ibid.*

32. *Ibid.*

33. *General Motors Acceptance Corp. v. Vanausdall*, 249 S.W. 2d 1003 (Mo. App. 1952).

some other new or additional relief.³⁴ However, "claim for relief" is the equivalent of the old "cause of action." It has been said that, in determining under this statute whether a new cause of action is alleged in an amended petition, the rule is firmly established that, as long as the plaintiff continues to seek recovery for the same injuries, a change in or addition to allegations of negligence causing injuries does not brand the amendment as introducing or substituting a new cause of action.³⁵ Hence, the test as to whether a new or additional claim is stated does not depend on a demand for more relief or the lack of such a request, but on whether the plaintiff in his statement seeks recovery for new injuries.

CONTINUANCE

It is the settled law that the granting of a continuance rests within the sound discretion of the trial court,³⁶ but it is not an absolute or arbitrary discretion; it is one that is subject to review if the discretion has been unsoundly exercised.³⁷

MOTION FOR DISMISSAL

Jurisdiction to dismiss for failure to comply with an order of the court, whether by inherent power or by authority conferred by Section 510.140 of the *Revised Statutes*, presupposes an order lawfully made, one which was within the judicial power of the court to enter.³⁸

Section 510.140 of the *Revised Statutes* authorizes a motion to dismiss at the close of the plaintiff's evidence in nonjury cases. If such a motion is filed in an equity case, a trial court has the right to weigh the evidence and to decide the case against the plaintiff.³⁹

In an action by a partnership against a bank to recover the amount of checks which the bank had cashed, and which had been drawn on the partnership's bank account by a former partner who was allegedly not authorized to draw on the account, the court properly denied the bank's motion to dismiss, which bore the signatures of the former partner and of a

34. *Miltenberger v. Center West Enterprises*, *supra* note 3.

35. *Ibid.*

36. *Van Fleet v. Van Fleet*, 253 S.W. 2d 508 (Mo. App. 1952); *Nelson v. Dorste*, 250 S.W. 2d 726 (Mo. App. 1952). For cases in which the court's rulings on continuances were sustained, see *Nelson v. Dorste* (above in this note) and *Commercial National Bank of Kansas City, Kan. v. White*, 254 S.W. 2d 605 (Mo. 1953).

37. *Nelson v. Dorste*, *supra* note 36.

38. *Healer v. Kansas City Public Service Co.*, 251 S.W. 2d 66 (Mo. 1952).

39. *Rippl v. Hauri*, 255 S.W. 2d 478 (Mo. 1953).

third person, who was never shown to have been a member of the partnership and which claimed that the suit was filed without their consent.⁴⁰

MOTIONS FOR DIRECTED VERDICTS

It is the settled rule that a motion for a directed verdict can be sustained only when the facts in evidence and the legitimate inferences therefrom are so strongly against the verdict as to leave no room for reasonable minds to differ.⁴¹

In viewing the propriety of directing a verdict for one of the parties, the evidence of the adverse party must be taken as true, and considered in light of the evidence most favorable to him.⁴²

A defendant waives an alleged error in overruling his motion for a directed verdict at the close of the plaintiff's evidence by thereafter introducing evidence on the merits of the case without previously objecting to the ruling.⁴³

VERDICTS

A verdict which disposes of the issues under the law and the facts of a case is proper, though it does not follow the form of the verdict instruction, when no objection is made to the failure to follow the instruction.⁴⁴

CASES TRIED WITHOUT A JURY

a. *Opinion*

In a recent case, the defendant complained that the trial court refused to make findings on controverted issues of fact and contended that that fact was a proper ground for reversal. Before final submission of the case the defendant made a general request, "That the court prepare and file a brief opinion containing a statement of the grounds for the court's decision and the method of determining any damages that may be awarded plaintiff." This was held to be a proper request which clearly followed the provisions of Section 510.310 of the *Revised Statutes*. The court at the time of entering judgment filed an opinion which included its findings upon all principal fact issues raised by the pleadings and supported by evidence. This opinion

40. *George W. Brown Construction Co. v. People's Bank of Branson*, 254 S.W. 2d 29 (Mo. App. 1953).

41. *Barger v. Green*, 255 S.W. 2d 127 (Mo. App. 1953); *Davenport v. Armstead*, 255 S.W. 2d 132 (Mo. App. 1952).

42. *Doelling v. St. Louis Public Service Co.*, 258 S.W. 2d 244 (Mo. App. 1953); *Scott County Milling Co. v. Thompson*, 255 S.W. 2d 121 (Mo. App. 1953).

43. *Doelling v. St. Louis Public Service Co.*, *supra* note 42; *Hieber v. Thompson*, 252 S.W. 2d 116 (Mo. App. 1952).

44. *Commercial National Bank of Kansas City, Kan. v. White*, *supra* note 36; *Miller v. Household Plastics Co.*, 250 S.W. 2d 964 (Mo. App. 1952).

was said fully to have complied with the aforesaid request of the defendant's counsel with the mandate of the statutory provision. The defendant, however, in addition to the aforementioned general request, filed a written instrument asking that findings be made on eight specific questions of fact and on ten additional declarations of fact. The court construed this as a request for findings and declarations favorable to the defendant. The opinion therefore recited that, since the court had found for the plaintiff, "The findings of controverted fact tendered in writing by defendant are denied." This formed the basis of the defendant's complaint.

It was decided that a court is not required specifically to answer every interrogatory submitted by a litigant. The court may determine its relevancy and whether the request involves a *principal* fact issue and may then prepare the opinion in such form and language as may best express its views and findings. It was said that the legislature clearly contemplated that findings would not be made upon every fact issue, as it included in the statute a provision that, "All fact issues upon which no specific findings are made shall be deemed found in accordance with the result reached." Hence, it was held that the opinion in question sufficiently complied with the request of the defendant.⁴⁵

b. Appeal

1. Sufficiency of Evidence

According to Section 510.310, subdivision 2, of the *Revised Statutes*, when a case is tried without a jury, the defendant may raise on appeal the question of the sufficiency of the evidence to support a judgment for the plaintiff even though he did not object on that ground at the trial.⁴⁶

In cases tried before the court, the appellate court must review the case both upon the law and the evidence. The judgment shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.⁴⁷ However, the appellate court should make independent findings of fact and reach its own conclusions on the weight of the evidence.⁴⁸

45. *Dubinsky v. Lindburg Cadillac Co.*, 250 S.W. 2d 830 (Mo. 1952).

46. *O'Neal v. Mavrakos Candy Co.*, *supra* note 24.

47. *Shreve v. Zuvekas*, 254 S.W. 2d 254 (Mo. App. 1953).

48. *Davidson v. Fisher*, 258 S.W. 2d 297 (Mo. App. 1953). For other cases supporting the last two points generally, see *Lowtrip v. Green*, 252 S.W. 2d 524 (Mo. 1952); *Basman v. Frank*, 250 S.W. 2d 989 (Mo. 1952); *Dubinsky v. Lindburg*, *supra* note 45; *Shortridge v. Ghio*, 255 S.W. 2d 838 (Mo. App. 1952); *Faire v. Burke*, 252 S.W. 2d 289 (Mo. 1952); *Billings v. Independent Mutual Fire Ins. Co.*, 251 S.W. 2d 399 (Mo. App. 1952).

This law has, during the period covered by this article, been applied to equity cases,⁴⁹ to actions at law,⁵⁰ and to divorce⁵¹ and separate maintenance⁵² proceedings.

But it has been held that the rule that the trial court is in a better position to judge the credibility of a witness than the appellate court does not apply where the evidence is taken by deposition.⁵³

NEW TRIALS

a. *Time for Making Motions for*

In an action, where the defendant, after a verdict had been returned for the plaintiff, filed a petition for removal, which was granted by a federal court, and then filed a motion for a new trial in the state circuit court, and thereafter the plaintiff's motion to remand was sustained by the federal court, the fact that the motion for a new trial was filed after the case had been removed to the federal court did not invalidate the filing.⁵⁴

b. *Grounds for*

The exclusion of proper evidence is ground for a new trial, especially where the excluded evidence goes to the very root of the matter in controversy. That there was other evidence of the same general character, or even that the rejected evidence was cumulative may not render the error harmless.⁵⁵

49. *Rigg v. Hart*, *supra* note 39; *State ex rel. Taylor, Attorney General v. Anderson*, 254 S.W. 2d 609 (Mo. 1953); *Oliver L. Taetz, Inc. v. Groff*, 253 S.W. 2d 824 (Mo. 1953); *Schellhardt v. Schellhardt*, 253 S.W. 2d 181 (Mo. 1952); *Tweed v. Timmons*, 253 S.W. 2d 176 (Mo. 1952); *Bennington v. McClintick*, 253 S.W. 2d 132 (Mo. 1952); *Howell v. Reynolds*, 249 S.W. 381 (Mo. 1952); *Jones v. Jones*, 254 S.W. 2d 260 (Mo. App. 1953); *Sellers v. Swehla*, 253 S.W. 847 (Mo. App. 1952); *Hughes v. Hughes*, 253 S.W. 2d 500 (Mo. App. 1952); *Amitin v. Izard*, 252 S.W. 2d 635 (Mo. App. 1952); *Burnett v. Sladek*, 251 S.W. 2d 397 (Mo. App. 1952).

50. *Boyle v. Crimm*, 253 S.W. 2d 149 (Mo. 1952); *City of Kirksville v. Young*, 252 S.W. 2d 286 (Mo. 1952); *Baker v. Kansas City Terminal Ry. Co.* 250 S.W. 2d 999 (Mo. 1952); *Roper v. Clanton*, 258 S.W. 2d 283 (Mo. App. 1953); *Brixey v. Luna*, 254 S.W. 2d 23 (Mo. App. 1953); *Truck Leasing Corp. v. Esquire Laundry & Dry Cleaning Co.*, 252 S.W. 2d 108 (Mo. App. 1952).

51. *Fago v. Fago*, 250 S.W. 2d 837 (Mo. 1952); *Dunlap v. Dunlap*, 255 S.W. 2d 441 (Mo. App. 1953); *Pipkin v. Pipkin*, 255 S.W. 2d 66 (Mo. App. 1953); *Davis v. Davis*, 254 S.W. 2d 270 (Mo. App. 1953); *Holmes v. Holmes*, 251 S.W. 2d 390 (Mo. App. 1952); *Jourdan v. Jourdan*, 251 S.W. 2d 380 (Mo. App. 1952); *Hawkins v. Hawkins*, 250 S.W. 2d 817 (Mo. App. 1952).

52. *Kendrick v. Kendrick*, 251 S.W. 2d 329 (Mo. App. 1952).

53. *Schoen v. Lange*, 256 S.W. 2d 277 (Mo. App. 1953).

54. *Waldron v. Skelly Oil Co.*, 257 S.W. 2d 615 (Mo. 1953).

55. *Dorn v. St. Louis Public Service Co.*, 250 S.W. 2d 859 (Mo. App. 1952).

One should notice, however, that a trial court is never justified in setting aside a verdict except for error prejudicial to the losing party.⁵⁶

c. *Form of Motion*

In a recent case the defendant's specific objection at the trial was, and its complaint in the supreme court was, that a deposition was not admissible because the witness was "subject to the jurisdiction of the court," had not been subpoenaed and "was permitted to leave voluntarily." The only assignment in the defendant's new trial motion which could possibly relate to the admission of the deposition was this generality: "Because the court erred in admitting, over the objections and exceptions of defendant, incompetent, irrelevant and prejudicial evidence offered by plaintiff."

It was held that there is a material difference between an objection to evidence as in competent and an objection as to the competency of a witness to testify, and that the allegation in the motion for a new trial was not sufficient to present for review an objection to the competency of the witness to give the testimony.⁵⁷

d. *Discretion of Court*

Trial courts have wide discretion in passing on motions for a new trial where there is error in the record,⁵⁸ and may even grant a new trial irrespective of the grounds assigned in a motion for a new trial.⁵⁹

But, despite this wide latitude allowed the trial court in such matters, it must not arbitrarily exercise its discretion, but must have some good and compelling reason or reasons to sustain its action. A trial court is never justified in setting aside a verdict except for error prejudicial to the losing party.⁶⁰

Moreover, the power of a trial court to grant a new trial is discretionary only as to questions of fact and matters affecting the determination of issues of fact. There is no discretion in the law of a case, nor can there be an

56. Phillips v. Vrooman, 251 S.W. 2d 626 (Mo. 1952).

57. Romandel v. Kansas City Public Service Co., 254 S.W. 2d 585 (Mo. 1953).

58. Cooper v. 804 Grand Building Corp., 257 S.W. 2d 649 (Mo. 1953); Robbins v. Brown-Strauss Corp., 257 S.W. 2d 643 (Mo. 1953); Gray v. St. Louis-San Francisco Ry., 254 S.W. 2d 577 (Mo. 1953); Heggeman v. St. Louis Public Service Co., 255 S.W. 2d 99 (Mo. App. 1953); Harrison v. St. Louis Public Service Co., 251 S.W. 2d 348 (Mo. App. 1952).

59. Cooper v. 804 Grand Building Corp., *supra* note 58; Robbins v. Brown-Strauss Corp., *supra* note 58.

60. Heggeman v. St. Louis Public Service Co., *supra* note 58.

exercise of sound discretion as to the law of a case.⁶¹ Thus, it was recently decided that discretion could not be used in determining whether or not a hospital record was admissible, since that was a question of law.⁶²

e. *Stating Reasons for Granting Motion*

It is the established rule in this state that, though the order granting a new trial cannot be sustained upon the ground specified by the trial court, a respondent is entitled to have the other assignments of error in his motion reviewed and the order granting a new trial affirmed if it can be upheld upon such other grounds.⁶³

It is further held that, where no discretionary ground was specified in an order granting a new trial, the supreme court will not presume that a trial court acted on discretionary grounds.⁶⁴

OBJECTIONS TO TRIAL ERRORS

a. *Time for*

It is fundamental in the concept of appellate practice that, save for certain recognized exceptions, questions of error not raised and properly preserved in the trial court will not be considered on appeal. This is in a fairness to both the lower court and to the opposing party so that each may have the opportunity of promptly remedying the error, if it in fact amounts to error and is of a character to be subject to correction. It is to this end that our code and rules provide that, if a party is to be in a position to complain of some action of the court, he must not only make known to the court the action which he desires it to take, or his objection to the action which it takes against him, but at the conclusion of the trial he must once again call all such matters to the court's attention in his motion for a new trial as a condition to his right of appellate review.

However, as an ultimate safeguard against a situation where some great wrong might be rendered incurable because of a mere procedural omission, provision is made that plain errors affecting substantial rights may be considered on appeal in the discretion of the court, though neither raised nor preserved in the trial court, when the court deems that manifest injustice or a miscarriage of justice has resulted therefrom.⁶⁵

61. *Cooper v. 804 Grand Building Corp.*, *supra* note 58; *Gray v. St. Louis San Francisco Ry. Co.*, *supra* note 58.

62. *Gray v. St. Louis-San Francisco Ry. Co.*, *supra* note 58.

63. *Cantwell v. Zook*, 250 S.W. 2d 980 (Mo. 1952); *White v. St. Louis Public Service Co.*, 249 S.W. 2d 498 (Mo. App. 1952).

64. *Cooper v. 804 Grand Building Corp.*, *supra* note 58.

65. *Harrison v. St. Louis Public Service Co.*, *supra* note 58.

During the past twelve-month period there have been several cases which have held that one waived the right to object on appeal to an error of a court by failing to object to that error both at the trial and in a motion for a new trial.⁶⁶ The same result has been reached when parties have been said to have abandoned objections made at the trial by failing to make them in a motion for a new trial.⁶⁷ Likewise, failure to make objections to alleged erroneous rulings of judges at trials has been said to bar consideration of those rulings on appeal.⁶⁸ The same result was reached when there was a failure to attend a taking of a deposition with a consequent lack of objection to a question put to the deponent.⁶⁹

On the other hand, it has been held that failure to make either a sufficient or a timely objection at a trial does not prevent a trial court from sustaining a new trial motion for any trial error called to the court's attention in such motion; and that, where an appellate court sustains the new trial order on such a ground specified by the trial court, the absence of a sufficient and timely objection at the trial is not fatal.⁷⁰

To the writer, this seems correct, for Section 510.210 of the *Revised Statutes* does not seem clearly to require an objection at the trial. It merely requires that an objection to trial court's ruling be made to *that* court in order to save most of that court's alleged erroneous rulings for consideration on appeal.

b. *Nature of*

An objection to the admissibility of evidence must be specific and must contain a proper ground for its exclusion, if the trial court is to be convicted of error in overruling the objection, except that, if it is apparent that

66. *Pierce v. New York Central R.R.*, 257 S.W. 2d 84 (Mo. 1953); *Block v. Rackers*, 256 S.W. 2d 760 (Mo. 1953); *Blevins v. Thompson*, 255 S.W. 2d 787 (Mo. 1953); *Hoffman v. St. Louis Public Service Co.*, 255 S.W. 2d 736 (Mo. 1953); *Moore v. St. Louis Public Service Co.*, 251 S.W. 2d 38 (Mo. 1952); *Villmer v. Household Plastics Co.*, *supra* note 44; *State ex rel. Kirks v. Allen*, 250 S.W. 2d 348 (Mo. 1952); *Baker v. Atkins*, 258 S.W. 2d 16 (Mo. App. 1953); *Smith v. G.F.C. Corp.*, 255 S.W. 2d 69 (Mo. App. 1953); *Morrison v. State*, 252 S.W. 2d 97 (Mo. App. 1952); *General Motors Acceptance Corp. v. Vanausdal*, 249 S.W. 2d 1003 (Mo. App. 1952); *Veal v. Leimkuehler*, 249 S.W. 2d 491 (Mo. App. 1952).

67. *Pierce v. New York Central R.R.*, *supra* note 66; *Phillips Pipe Line Co. v. Brandstetter*, 254 S.W. 2d 636 (Mo. 1953); *Williamson v. St. Louis Public Service Co.*, 252 S.W. 2d 295 (Mo. 1952); *Baker v. Atkins*, *supra* note 66.

68. *Anderson v. Woodward Implement Co.*, 256 S.W. 2d 819 (Mo. 1953); *Dixon v. Burtrum*, 258 S.W. 2d 24 (Mo. App. 1953); *State ex rel. Consolidated School Dist. C-4 of Caldwell County v. Blackwell*, 254 S.W. 2d 243 (Mo. App. 1953); *Banks v. St. Louis Public Service Co.*, 249 S.W. 2d 481 (Mo. App. 1952).

69. *J. R. Watkins Co. v. Lankford*, 250 S.W. 2d 798 (Mo. App. 1952).

70. *Phillips v. Vreeman*, 251 S.W. 2d 626 (Mo. 1952).

the evidence is self-evidently wholly incompetent for any purpose, or that it is obviously unjustly inflammatory and prejudicial and can serve no purpose whatever in the case, overruling of a general objection may be reversible error. A mere description of testimony as inflammatory, prejudicial, self-serving, and inadmissible is generally construed to be merely hypothetical in nature and insufficient to present anything for review.⁷¹

Where the plaintiff admitted at the time a hospital record was read into evidence that it was the record of the hospital kept in regular course of business, but objected to the admission of parts of the record on the ground of hearsay, the plaintiff did not thereby question the reliability of the records and could not contend for the first time on appeal that the entries objected to were wholly inadmissible in the absence of *evidence* as to the mode or method of preparation of the hospital records, the time the record entries were made, and the sources of information.⁷²

Though our law, which requires that the grounds of a motion for a directed verdict must be made known to the court, had not been complied with, where an examination of the record indicated that the trial court must have known the grounds urged by the defendant in support of its motion for a directed verdict, consideration by the court of appeals of the question as to whether or not the motion should have been sustained was not foreclosed.⁷³

It has been held that an objection to an instruction that it is confusing and misleading, without stating wherein it is confusing and misleading, is wholly without merit and must be denied.⁷⁴

It has been decided that, where counsel, in objection to the argument of the opposing attorney, merely said "now, if Your Honor please, that is highly improper," that statement was not such an objection and a request for action on the part of the court as to compel a review of the trial court's discretion in passing upon the incident.⁷⁵

It has also been held that, where paragraph three of a second amended answer was very similar to paragraph two of the amended answer of the defendant to the plaintiff's third amended petition, the supreme court would consider as properly raised the question as to whether the trial court had erred in overruling the plaintiff's motion to strike paragraph three of the

71. *Hoffman v. St. Louis Public Service Co.*, *supra* note 66.

72. *Melton v. St. Louis Public Service Co.*, 251 S.W. 2d 663 (Mo. 1952).

73. *Meyer v. St. Louis Public Service Co.*, 253 S.W. 2d 525 (Mo. App. 1952).

74. *Anderson v. Woodward Implement Co.*, *supra* note 68.

75. *Williams v. Thompson*, 251 S.W. 2d 89 (Mo. 1952).

defendant's second amended answer, notwithstanding the fact that the only motion filed had been one to strike paragraph two of "defendant's amended answer to plaintiff's third amended petition."⁷⁶

APPEAL

a. *Right Statutory*

It is fundamental that the right of appeal exists only as provided by statute;⁷⁷ and, while appeals are favored, and statutes granting the right of appeal are to be liberally construed, there is no room for indulging liberality unless there is some reasonable statutory basis for the exercise of the right which is being claimed in the particular case.⁷⁸

b. *Final Judgment*

For the purposes of an appeal a judgment must usually be a final judgment and it must ordinarily dispose of all the parties and of all the issues in the case.⁷⁹

However, it has been held that, construing together Sections 510.330 and 512.020, of the *Revised Statutes*, which provide for new trials and for appeals respectively, a trial court may, by an appropriate order, make a judgment final as to any party as to whom, or on any issue on which, no new trial is ordered; and that any party aggrieved by such a final judgment is entitled to appeal therefrom.⁸⁰

Section 510.180(2) of the *Revised Statutes* provides that a court may order separate trials of claims by various parties, and Supreme Court Rule 3.29 states that a final judgment may be rendered in connection with any of the claims separately tried.⁸¹

A judgment granting a motion to dismiss count one and denying a motion to dismiss separate counts two and three of a petition was not final

76. *Kansas City Stock Yards Co. v. A. Reich & Sons*, *supra* note 17.

77. *Tucker v. Miller*, 253 S.W. 2d 821 (Mo. 1953); *Stith v. St. Louis Public Service Co.*, 251 S.W. 2d 693 (Mo. 1952); *Samuel C. Stott Co. v. Inter-City Mfg. Co.*, 251 S.W. 2d 978 (Mo. App. 1952).

78. *Samuel C. Stott Co. v. Inter-City Mfg. Co.*, *supra* note 77. Notice also that the error must not be harmless. *Harrison v. St. Louis Public Service Co.*, *supra* note 58, decides that seating one objectionable juror is not a harmless error, though nine jurors may render a verdict.

79. *Weir v. Brune*, 256 S.W. 2d 810 (Mo. 1953); *Tucker v. Miller*, *supra* note 77; *Stith v. St. Louis Public Service Co.*, *supra* note 77; *Ash Grove School Dist. R-4 v. Callison*, 252 S.W. 2d 96 (Mo. App. 1952); *Samuel C. Stott Co. v. Inter-City Mfg. Co.*, *supra* note 77.

80. *Stith v. St. Louis Public Service Co.*, *supra* note 77.

81. *Appl. v. Lizard*, *supra* note 49.

in the appellate sense on any theory that counts two and three were separable or that separate trials had been ordered, where the trial court did not order, and the plaintiffs did not seek, a separate trial of counts two and three.⁸²

Where there were originally four counts in a petition, but one count was abandoned and a separate trial was ordered as to another count, a judgment dismissing the remaining two counts for failure to state a cause of action was a final judgment.⁸³

It has also been decided that, even though a judgment of dismissal recited that "Thereupon comes plaintiff, by attorney, and upon oral motion" the action is dismissed, that fact did not make the order one based on the voluntary act of the plaintiffs so that the judgment was a dismissal without prejudice and not appealable. The judgment was a dismissal without prejudice and not appealable. The judgment of dismissal was final for the purpose of appeal, since the dismissal was based on the failure of the petition to state a cause of action.⁸⁴

On the other hand, it has been held that an order quashing service for lack of venue is not a final appealable judgment.⁸⁵

It has also been determined that there can be no final judgment at the interpleader stage of a case, unless the interpleader as a stakeholder pays the money into court and is discharged from the case, leaving the interpleaders to litigate for it between themselves.⁸⁶

A judgment directing appraisal of homestead and dower interests and indicating the distribution to be made between a widow and her step-child was not a "final and appealable judgment," since much remained to be done before the issues were all determined as to all the parties.⁸⁷

The entry of a judgment is to be made as of the day of the verdict, or the day of its rendition by the court in trials without a jury. The judgment is not then a final determination of the rights of the parties. The statutes permit a motion for a new trial to be filed not later than ten days after the entry of the judgment, and, if timely filed, "the judgment is not final until

82. *Weir v. Brune*, *supra* note 79.

83. *Lightfoot v. Jennings*, 254 S.W. 2d 596 (Mo. 1953). Also see *Frank v. Sinclair Refining Co.*, 256 S.W. 2d 793 (Mo. 1953) which holds that the dismissal of a petition for failure to state a cause of action is a final judgment.

84. *Frank v. Sinclair Refining Co.*, *supra* note 83.

85. *Ibid.*

86. *Heinrich v. South Side National Bank in St. Louis*, *supra* note 7.

87. *Union Carbide & Carbon Corp. v. American Cyanamid Co.*, 252 S.W. 2d 837 (Mo. App., 1952).

disposition of the motion," and, if "not passed on within ninety days after the motion is filed, it is deemed denied for all purposes." So long as the motion for a new trial is pending undetermined, the judgment is not final and appealable.⁸⁸

c. *New Trial Granted*

A defendant may appeal from a *judgment entered on a jury's verdict for the plaintiff*, if his new trial motion is overruled in its entirety.⁸⁹

Also, where a defendant, after verdict moved for a new trial, but the court granted a new trial as to the issue of damages and overruled the motion as to all other particulars, the new trial ordered was one for which the defendant had not asked in its motion and one which the plaintiff did not seek and was, thus, on the court's own motion, and its order constituted an order granting a new trial from which both the plaintiff and the defendant, as aggrieved parties, could appeal.⁹⁰

d. *Order Refusing Motion for Judgment in Accordance with Motion for Directed Verdict*

It is held that an order overruling a defendant's after-trial motion to set aside a verdict and judgment and for judgment in accordance with the defendant's trial motion for a directed verdict is not appealable, since there is no statutory provision for an appeal from such an order.⁹¹

e. *Court's Duty as to Right to Appeal*

Though neither party raises the question, it is the duty of an appellate court to determine of its own volition whether a judgment appealed from is a final judgment from which an appeal may be taken.⁹² This means that it must, on its own motion determine whether or not it has jurisdiction.

f. *Designation of Parties*

The parties on appeal are placed in the same position as they were in the petition.⁹³

88. *Tucker v. Miller*, *supra* note 77.

89. *Stith v. St. Louis Public Service Co.*, *supra* note 77.

90. *Ibid.*

91. *Ibid.*

92. *Osborn v. Osborn*, *supra* note 87.

93. *Campbell v. Sheraton Corp. of America*, 253 S.W. 2d 106 (Mo. 1952).

g. *How Taken*

1. Notice of Appeal

(a) Necessity for

The timely filing of a notice of appeal is the statutory "vital step" for perfecting an appeal and is jurisdictional.⁹⁴

(b) Time for filing

It is mandatory requirement that a notice of appeal be filed with the clerk of the trial court "not later than ten days after the judgment or order appealed from becomes final," except where the ten days have expired, and the filing of a notice of appeal within six months from the date of final judgment has been permitted by special order of the appropriate appellate court.⁹⁵

This allows six months after a judgment becomes final and appealable in which to investigate *and* to procure the special order.⁹⁶

A notice of appeal is prematurely filed, and ineffective, if it is filed after a motion for a new trial has been filed and before the judgment involved has thereafter become final, either by the expiration of ninety days after the filing of the motion or by the court's passing on the motion at an earlier date.⁹⁷

A notice of appeal is not considered filed with a clerk of court until he has knowledge of its filing.⁹⁸

(c) Multiple Notices

The filing, and transmitting to an appellate court, of two notices of appeal by separate defendants does not mean that there are two cases pending in this court, each of which is to be disposed of separately, but, instead, there is only the single case, just as there was in the court below.⁹⁹

2. Transcript

(a) Agreed Statement of Case

Section 512.120 of the Revised Statutes requires that the "statement

94. *Byers v. Zuspann*, 257 S.W. 2d 384 (Mo. App. 1953).

95. *Byers v. Zuspann*, *supra* note 94; *Tucker v. Miller*, *supra* note 77.

96. *Tucker v. Miller*, *supra* note 77.

97. *Ibid.*

98. *Byers v. Zuspann*, *supra* note 94.

99. *Hughes v. St. Louis Public Service Co.*, 251 S.W. 2d 360 (Mo. App. 1952).

of case" must contain the facts essential to a decision of the questions sought to be presented.¹⁰⁰

(b) Abandoned Pleadings

When one amends a petition by filing a new amended pleading, he abandons his initial petition and it should not appear in the appellate transcript.¹⁰¹

3. Brief

(a) Supreme Court Rule 1.08

1. To Be complied with

The clear, specific, and simple provisions of Supreme Court Rule 1.08 should be fully complied with in the preparation of briefs.¹⁰²

2. Purpose

It was adopted for the purpose not only of aiding the court in its work but also for the purpose of guarding against the disturbance of judgments except upon a full and fair presentation of the whole record necessary to a determination of properly presented errors.¹⁰³

(b) Statement of Facts

The purpose of the statement of facts is primarily to afford an immediate, accurate, complete, and unbiased understanding of the facts of the case, and one which does not fairly present the facts is pernicious to the extent it conveys in the first instance a false, distorted, or imperfect impression of the facts.¹⁰⁴

A statement which presents the contestants' view of the facts and does not cover the facts favorable to the proponents is incorrectly drafted.¹⁰⁵

(c) Points and Authorities

Supreme Court Rule 1.08(a)(3) contemplates a particularization in the statement of the points relied upon and the citation of authorities to the specific points to which they apply.¹⁰⁶

Points relied on in a brief should not be abstract in nature and they

100. *Communication Workers of America Local No. 6325 v. Brown*, 252 S.W. 2d 103 (Mo. App. 1952).

101. *Weir v. Brune*, *supra* note 79.

102. *Fuchs v. Reorganized School Dist. No. 2, Gasconade County*, 251 S.W. 2d 677 (Mo. 1952).

103. *Wipfler v. Basler*, 250 S.W. 2d 982 (Mo. 1952).

104. *Ibid.*

105. *Ibid.*

106. *Id.* <https://scholarship.law.missouri.edu/mlr/vol18/iss4/1>

should not require an appellate court to speculate as to the specific matters constituting alleged errors.¹⁰⁷

Grounds for recovery pleaded in a petition, but not referred to in one's points in his brief, are deemed abandoned.¹⁰⁸

Also where the appellant cited no authorities in support of a contention, and failed to develop and explain it, that contention, for the purpose of appeal, was deemed to have been abandoned.¹⁰⁹

Merely stating that the trial court erred in giving certain instructions does not comply with Supreme Court Rule 1.08(a)(3) since it is not stated wherein the instructions are improper.¹¹⁰

(d) Argument

References in a brief to page numbers in a transcript should point out specifically what material is referred to. An appellate court is not required to search out the record and speculate as to just what particular matter counsel had in mind in making such references.¹¹¹

Though a point is stated in one's points and authorities and is supported by authorities, if it is not argued, it is considered abandoned.¹¹²

h. *Changing Theories on Appeal*

It is a well-settled principle of law, long established and applied in many cases, that parties will be bound on appeal by the positions they have taken in the trial court.¹¹³

This doctrine has been applied recently to an attempt to change the ground of objection to the introduction of evidence.¹¹⁴ It has also been held that one can not claim at a trial that a particular issue is one of fact to be decided by a jury and, on appeal, assert that it is an issue of law to be decided by the court.¹¹⁵

107. *Ibid.*

108. *Brownfield v. Brownfield*, 249 S.W. 2d 389 (Mo. 1952); *Baker v. Atkins*, *supra* note 66.

109. *Baker v. Atkins*, *supra* note 66; *Scott County Milling Co. v. Thompson*, *supra* note 42.

110. *Pierce v. New York Central R.R.*, *supra* note 66.

111. *Wiffler v. Basler*, *supra* note 103; *Anderson v. Woodward Implement Co.*, *supra* note 68.

112. *Leslie v. Mathewson*, 257 S.W. 2d 394 (Mo. App. 1953).

113. *Williams v. St. Louis Public Service Co.*, 253 S.W. 2d 97 (Mo. 1952); *Heuer v. John R. Thompson Co.*, 251 S.W. 2d 980 (Mo. App. 1952).

114. *Williams v. St. Louis Public Service Co.*, *supra* note 113.

115. *Thornburgh v. Hunkler*, 255 S.W. 2d 975 (Mo. 1953).

i. *Matters Considered on Appeal*

It is fundamental in the concept of appellate practice that, save for certain recognized exceptions, questions of error not raised and properly preserved in the trial court will not be considered on appeal.¹¹⁶

It has, however, been held that a fact admitted in the appellant's brief may be assumed to be true in determining the appellant's rights though it was not in evidence before the trial court.¹¹⁷

Further, it has been decided that the supreme court may consider a contention that the record shows that the judgment attacked is void, even though that contention is raised for the first time on appeal.¹¹⁸ A void judgment based on lack of a judge's authority to deal with the subject matter covered by the judgment may always be attacked.

It has likewise been determined that whether or not a submissible case is made is inherent in every case that comes to an appellate court.¹¹⁹

One must also remember that Supreme Court Rule 3.27 provides, as an ultimate safeguard against a situation where some great wrong might otherwise be rendered incurable because of a mere procedural omission, that plain errors affecting substantial rights may be considered on appeal, though they were neither raised nor preserved in the trial court, when an appellate court believes that manifest injustice or a miscarriage of justice has resulted therefrom.¹²⁰ In fact, it has been stated that it would be an abuse of discretion on the part of an appellate court to refuse to act under this rule.¹²¹

For instance, it has been held that, for a court to substitute its judgment for the verdict of the jury, thus depriving the parties of a jury trial of the issues in the case, without any authority of law so to do, was a plain error, substantially affecting the rights of the parties and working a manifest injustice if allowed to stand. The court said, further, that it was its duty, under Supreme Court Rule 3.27, to consider that point even though the plaintiff took no steps, if any were then available, to preserve the point in the trial court.¹²²

On the other hand, the conduct of a trial judge in questioning a witness

116. *Harrison v. St. Louis Public Service Co.*, *supra* note 58. See also *Veatch v. Black*, 250 2d 501 (Mo. 1952) and *Jones v. Giannola*, 252 S.W. 2d 660 (Mo. App. 1952).

117. *Politte v. Wall*, 256 S.W. 2d 283 (Mo. App. 1953).

118. *Healer v. Kansas City Public Service Co.*, *supra* note 38.

119. *Adair County v. Urban*, 250 S.W. 2d 493 (Mo. 1952).

120. *Harrison v. St. Louis Public Service Co.*, *supra* note 58.

121. *Leslie v. Mathewson*, *supra* note 112.

122. *Jager v. Agnew*, 252 S.W. 2d 847 (Mo. 1952).

was held not to call for a review of that conduct under Supreme Court Rule 3.27.¹²³

j. *Duty of Appellate Courts*

1. In General

It should again be noticed that an appellate court has the duty to determine whether a final appealable judgment has been entered in a cause, though that issue has not been raised by the parties.¹²⁴

Such a court also has a duty to dispose of a case on appeal, if possible, so that litigation may not be unreasonably prolonged. With this in mind, the Kansas City Court of Appeals recently reversed outright a judgment for a plaintiff on the ground that the evidence showed that the plaintiff was guilty of contributory negligence which the defendants pleaded, though they had not assigned as error the overruling of their motion for a directed verdict and their after-trial motion for judgment. The appellate court had determined that the plaintiff had not made a case on the issues submitted.¹²⁵

In compliance with the provision in Section 512.160(3) of the *Revised Statutes* to the effect that an appellate court shall examine the transcript on appeal and give such judgments as the trial court ought to have given, as to the appellate court shall seem agreeable to law, the supreme court lately modified a judgment to dispose of a counterclaim which had been covered by the verdict in the case, but which the judgment therein had failed to mention.¹²⁶

2. As to Matters Involving Discretion of Court

It is a rule which has long been established and applied in many decisions of our court, that an appellate court should not interfere with the findings and conclusions of the trial judge, unless, there has been a manifest abuse of judicial discretion by the trial judge.¹²⁷

For example, the competency of a juror is a question of fact and the finding of the circuit court as to it will not be disturbed unless clearly against the evidence.¹²⁸

Also, the trial court's exercise of discretion in regard to the scope and

123. *Baker v. Atkins*, *supra* note 66.

124. *Ash Grove School Dist. R-4 v. Callison*, *supra* note 79.

125. *Thomas v. Aines Farm Dairy*, 257 S.W. 2d 228 (Mo. App. 1953).

126. *Commercial National Bank of Kansas City, Kan. v. White*, *supra* note 36.

127. *Jourdan v. Jourdan*, *supra* note 51.

128. *Hieber v. Thompson*, *supra* note 43; *Harrison v. St. Louis Public Service*

extent of re-direct examination will not be disturbed by an appellate court, unless an abuse of discretion is clearly shown.¹²⁹

3. Weighing Evidence

It is within the province of the jury to weigh the testimony. By their verdict on that issue, an appellate court is bound.¹³⁰ Also, an assignment that the verdict is against the weight of the evidence is a matter to be decided solely by the trial court.¹³¹

k. *Tests Applied in Reaching Judgment as to Whether Submissible Case Has Been Made*

1. Substantial Evidence

It has been held that the law governing the sufficiency of evidence which appellate courts should apply is that it is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.¹³² Where there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.¹³³

2. Evidence Considered and Attitudes Toward It

It is a well-established rule that, in passing on the question as to whether a party has made a case for the jury on an issue pleaded, an appel-

129. *Eickmann v. St. Louis Public Service Co.*, 253 S.W. 2d 122 (Mo. 1952).

130. *McCaffery v. St. Louis Public Service Co.*, 252 S.W. 2d 361 (Mo. 1952); *Kansas City Stock Yards Co. v. A. Reich & Sons, Inc.*, *supra* note 17; *Papen v. Friedmeyer*, 255 S.W. 2d 841 (Mo. App. 1953); *Young v. Kansas City Public Service Co.*, 255 S.W. 2d 113 (Mo. App. 1952).

131. *Romandel v. Kansas City Public Service Co.*, *supra* note 57; *Stith v. St. Louis Public Service Co.*, *supra* note 77; *Davidson v. Fisher*, *supra* note 48.

132. *Fyock v. Riales*, 251 S.W. 2d 102 (Mo. App. 1953). See, in accord, *Hatfield v. Thompson*, 252 S.W. 2d 534 (Mo. 1952); *White v. Barkovitz*, 254 S.W. 2d 291 (Mo. App. 1953); *Finley v. Illinois Central R.R.*, 251 S.W. 2d 713 (Mo. App. 1952).

133. *Fyock v. Riales*, *supra* note 132. In accord, see *Winters v. Terminal R. R. Ass'n. of St. Louis*, 252 S.W. 2d 380 (Mo. 1952). The same idea has been expressed in *Wann v. Gruner*, 251 S.W. 2d 57 (Mo. 1952), in which it was said that findings and a decree which are based upon substantial evidence should not be disturbed on appeal.

late court must accept as true all evidence favorable to the plaintiff's case.¹³⁴ Another way that this idea has been expressed is to state that the appellate court must consider the evidence most favorable to the respondent.¹³⁵ Yet another expression that has been used to indicate the same idea is to the effect that an appellate court must view the evidence in the light most favorable to the respondent.¹³⁶

In this connection it has also been decided that the appellant's evidence should be disregarded except as it aids the respondent.¹³⁷

Finally, it has been stated that, in determining whether or not the respondent has made a case, he should be given the benefit of all reasonable inferences which can be drawn from the evidence which is favorable to him.¹³⁸

1. *Appeals on Grounds of Excessive or Inadequate Verdicts or Judgments*

1. In General

In passing upon the point of the size of a verdict, an appellate court is only concerned with the legal aspects of the question. It may determine whether a verdict was either inadequate as a matter of law or excessive as

134. *Anderson v. Woodward Implement Co.*, *supra* note 68; *Douglas v. Douglas*, 255 S.W. 2d 756 (Mo. 1953); *Miles v. Ozark Bowl*, 250 S.W. 2d 849 (Mo. 1952); *Snell v. Seek*, 250 S.W. 2d 336 (Mo. 1952); *Barton v. Farmers Ins. Exchange*, 255 S.W. 2d 451 (Mo. App. 1953); *Scott County Milling Co. v. Thompson*, *supra* note 42; *Stanley v. Stanley*, 251 S.W. 2d 365 (Mo. App. 1952); *Fyock v. Riales*, *supra* note 132; *Amos—James Grocery Co. v. Cannors Exchange, Inc.*, 250 S.W. 2d 171 (Mo. App. 1952).

135. *Lee v. Holland*, 258 S.W. 2d 30 (Mo. App. 1953); *Baker v. Atkins*, *supra* note 66; *Finley v. Illinois Central R.R.*, 251 S.W. 2d 713 (Mo. App. 1952); *Bumpus v. St. Louis Public Service Co.*, 251 S.W. 2d 371 (Mo. App. 1952); *DeVoto v. St. Louis Public Service Co.*, 251 S.W. 2d 355 (Mo. App. 1952).

136. *Wofford v. St. Louis Public Service Co.*, 252 S.W. 2d 529 (Mo. 1952); *McCaffery v. St. Louis Public Service Co.*, *supra* note 130; *Turbett v. Thompson*, 252 S.W. 2d 319 (Mo. 1952); *Williamson v. St. Louis Public Service Co.*, *supra* note 67; *Thomas v. Aines Farm Dairy*, *supra* note 125; *Long v. Mississippi Lime Co. of Missouri*, 257 S.W. 2d 167 (Mo. App. 1953); *White v. Barkovitz*, *supra* note 132; *Burke v. Renick*, 249 S.W. 2d 513 (Mo. App. 1952).

137. *Douglas v. Douglas*, *supra* note 134; *Wofford v. St. Louis Public Service Co.*, *supra* note 136; *Williamson v. St. Louis Public Service Co.*, *supra* note 67; *Miles v. Ozark Bowl*, *supra* note 134; *Snell v. Seek*, *supra* note 134; *Lee v. Holland*, *supra* note 135; *Baker v. Atkins*, *supra* note 66; *Barton v. Farmers Ins. Exchange*, *supra* note 134; *Fyock v. Riales*, *supra* note 132.

138. *Anderson v. Woodward Implement Co.*, *supra* note 68; *Douglas v. Douglas*, *supra* note 134; *Wofford v. St. Louis Public Service Co.*, *supra* note 136; *Miles v. Ozark Bowl*, *supra* note 134; *Snell v. Seek*, *supra* note 134; *Lee v. Holland*, *supra* note 135; *Baker v. Atkins*, *supra* note 66; *Barton v. Farmers Ins. Exchange*, *supra* note 134; *Scott County Milling Co. v. Thompson*, *supra* note 42; *Bumpus v. St. Louis Public Service Co.*, *supra* note 135; *Stanley v. Stanley*, *supra* note 134; *Fyock v. Riales*, *supra* note 132; *Amos—James Grocery Co. v. Cannors Exchange, Inc.*, *supra* note 134.

a matter of law, but between these two extremes the finding of the jury is conclusive save only as it is subject to the approval or disapproval of the trial judge, who has the power to weigh the evidence. Even though an award approaches the maximum allowable for the injuries sustained, if it represents the calm and considered judgment of the jury when acting within its special function, there is no occasion for appellate interference.¹³⁹

It is well settled that each case must be considered upon its own facts, and that the court should not interfere with the discretion of the jury in fixing the amount of an award unless the verdict shocks the judicial conscience. An appellate court must also be mindful of the changed economic conditions of the present time and of the reduced purchasing power of the dollar.¹⁴⁰

2. Evidence Considered

In determining the issue as to whether or not a verdict is excessive, an appellate court should not weigh all of the evidence, but should consider only the evidence and inferences most favorable to the plaintiff and to the jury's verdict which has had the approval of the trial court.¹⁴¹

The same idea was expressed in a somewhat different way, when the supreme court said that, in determining the excessiveness of an award, it considered the evidence of the nature and extent of plaintiff's injury from a standpoint favorable to plaintiff.¹⁴²

3. Abuse of Discretion

Finally, the supreme court has held that, in determining whether or not a new trial had been properly granted because of the excessiveness of a verdict, it would proceed on the theory that the trial court's ruling was correct, unless the evidence showed the contrary clearly enough to establish an abuse of discretion on the part of said court.¹⁴³

m. Judgment of Appellate Court

1. Dismissal

(a) For Failure to Proceed with Appeal

Where an appellant failed to do anything toward appealing his case except to file a notice of appeal, his appeal was dismissed.¹⁴⁴

139. *Harrison v. St. Louis Public Service Co.*, *supra* note 58.

140. *Young v. Kansas City Public Service Co.*, *supra* note 130.

141. *Pierce v. New York Central R.R.*, *supra* note 66; *Parks v. Thompson*, *supra* note 27.

142. *Meade v. Kansas City Public Service Co.*, 250 S.W. 2d 513 (Mo. 1952).

143. *Parks v. Thompson*, *supra* note 27.

144. *Hughes v. St. Louis Public Service Co.*, *supra* note 22.

(b) For Noncompliance with Rules of Court

Recently an appeal was dismissed because the statement of facts in the appellant's brief did not fairly set forth the relevant evidence and failed to include the facts upon which the defense rested and because the brief contained no assignments of error.¹⁴⁵

The appeal in another case was dismissed because it was impossible to ascertain from the brief the questions which the appellant wished to present for determination.¹⁴⁶

On the other hand, the supreme court refrained from dismissing an appeal in which the brief contained a statement of the facts which was unfair in that it stated the evidence in favor of the appellant more favorably than the record justified, and omitted the evidence favorable to the respondent. It did this because it saw from the plaintiffs' (appellants') brief that their attorneys were under the impression that, when a defendant in an equity case files a motion to dismiss at the close of plaintiff's case and the motion is sustained, on appeal the evidence must be considered in its most favorable light to the plaintiff.¹⁴⁷

2. Judgment Reversed

Where an appellant should have had a directed verdict, as the facts in evidence and the legitimate inferences therefrom were so strongly against the verdict as to leave no room for reasonable minds to differ, the judgment should be reversed.¹⁴⁸

However, a case will not be reversed because of an error not affecting the merits of the case.¹⁴⁹

3. Remanding upon Reversal

It has been held that the furtherance of justice requires that a case should not be reversed without remanding unless the appellate court is convinced that the facts are such that a recovery cannot be had; and, even though the plaintiff fails to substantiate the theory upon which his case was tried, if he nevertheless shows a state of facts which might entitle him to a recovery if his case were brought upon a proper theory, the judgment will not be reversed outright, but, instead, in the exercise of a sound judicial discretion, the case will be remanded to give him the opportunity to amend his

145. *Shreve v. Zuvekas*, *supra* note 47.

146. *Williamson v. Glessner*, 249 S.W. 2d 871 (Mo. App. 1952).

147. *Rigg v. Hart*, *supra* note 39.

148. *Stone v. Farmington Aviation Corp.*, 253 S.W. 2d 810 (Mo. 1953):

149. *Paper v. Friedman*, 255 S.W. 2d 841 (Mo. App. 1953).

petition, if so advised, so as to state a case upon the theory which his evidence discloses.¹⁵⁰

However, where the plaintiff at a trial developed all of his evidence on various available theories on which he might recover and where he then deliberately chose to restrict the submission of his case to one theory, the supreme court has reversed without remanding the case for a new trial.¹⁵¹

Also, where newly discovered evidence concerning the extent of injuries to the plaintiff would be sharply disputed in the event of a retrial, and the question raised by the newly-discovered evidence had been litigated at the trial, the supreme court, on appeal, refused to remand the case for a retrial on the question of the extent of the injuries.¹⁵²

On the other hand, where the plaintiff consistently and erroneously adhered at the trial to an attempt to recover under the humanitarian rule, rather than to stress the defendant's wilful or reckless conduct, the supreme court remanded the case to permit a retrial on the theory of wilful or reckless conduct, because the court thought that its decisions prior to this case may have been equivocal upon the question of the applicability of the humanitarian rule to claims supported by evidence like that introduced in the instant case, which evidence it thought did not support the submission of a defendant's responsibility for negligence under that rule.¹⁵³

A remand may be merely for a retrial of an issue of liability¹⁵⁴ or of damages,¹⁵⁵ when the error below deals only with one of these issues.

4. Penalty for Vexatious Appeal

Where a judgment for the plaintiff in a personal injury action was reversed and the cause was remanded for a new trial, the plaintiff was held not to be entitled to an assessment of damages under the statute relating to vexatious appeals, since that statute provides for such damages only upon the affirmance of a judgment or order, or upon the dismissal of a case.¹⁵⁶

n. *Rehearing*

If the opinion of an appellate court on its face is in fact incomplete without a remanding of the cause for further proceedings on counterclaims,

150. *Stone v. Farmington Aviation Co.*, *supra* note 148; *Smith v. St. Louis Public Service Co.*, 252 S.W. 2d 83 (Mo. 1952); *O'Neal v. Mavrakos Candy Co.*, *supra* note 24.

151. *Stone v. Farmington Aviation Co.*, *supra* note 148.

152. *Gurley v. St. Louis Public Service Co.*, 256 S.W. 2d 755 (Mo. 1953).

153. *McClanahan v. St. Louis Public Service Co.*, 251 S.W. 2d 704 (Mo. 1953).

154. *Stith v. St. Louis Public Service Co.*, *supra* note 77.

155. *Doelling v. St. Louis Public Service Co.*, *supra* note 42.

156. *Shepherd v. Womack*, *supra* note 20.

it is the duty of the defendant by a timely motion for a rehearing, or to modify, or by some other proper means, to call to the court's attention the necessity of such a correction.¹⁵⁷

o. Transfer

When a case is properly transferred to the supreme court from a court of appeals, the supreme court proceeds as though the cause had come to it on an original appeal.¹⁵⁸ Hence, though the supreme court approves the opinion of the court of appeals, it has the duty to determine the appeal anew.¹⁵⁹

157. *Dorn v. St. Louis Public Service Co.*, *supra* note 55.

158. *Hayes v. Hayes*, 252 S.W. 2d 323 (Mo. 1952).

159. *Beetschen v. Shell Pipe Line Corporation*, 253 S.W. 2d 785 (Mo. 1952).